DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-694
Title: Joel Judulang, Petitioner
v.
Eric H. Holder, Jr., Attorney General
Docketed: November 29, 2010
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (06-70986)
Decision Date: September 17, 2007
Rehearing Denied: August 26, 2010
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 24 2010	Petition for a writ of certiorari filed. (Response due December 29, 2010)
Dec 21 2010	Order extending time to file response to petition to and including January 28, 2011.
Jan 25 2011	Order further extending time to file response to petition to and including February 28, 2011.
Feb 28 2011	Brief of respondent Eric H. Holder, Jr., Attorney General in opposition filed.
Mar 15 2011	Reply of petitioner Joel Judulang filed.
Mar 16 2011	DISTRIBUTED for Conference of April 1, 2011.
Apr 11 2011	DISTRIBUTED for Conference of April 15, 2011.
Apr 18 2011	Petition GRANTED.
May 4 2011	Motion to dispense with printing the joint appendix filed by petitioner Joel Judulang.
May 16 2011	The time to file the joint appendix and petitioner's brief on the merits to and including July 5, 2011.
May 16 2011	The time to file respondent's brief on the merits is extended to and including August 26, 2011.
May 31 2011	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jul 5 2011	Brief of petitioner Joel Judulang filed.
Jul 12 2011	Brief amici curiae of National Immigrant Justice Center, et al. filed.
Jul 12 2011	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Jul 12 2011	Brief amici curiae of Former Immigration Officials filed.
Jul 12 2011	Brief amici curiae of Catholic Legal Immigration Network, Inc. and World Relief filed.
Jul 12 2011	Brief amici curiae of 39 Immigration Law Professors filed.
Jul 19 2011	SET FOR ARGUMENT ON Wednesday, October 12, 2011.
Aug 2 2011	CIRCULATED.
Aug 15 2011	Record received from U.S.C.A. for the 9th Circuit. (1 envelope) This record also includes

	the administrative record from the U.S. Department of Justice.
Aug 26 2011	Brief of respondent Eric H. Holder, Jr., Attorney General filed. (Distributed)
Sep 23 2011	Reply of petitioner Joel Judulang filed. (Distributed)
Oct 12 2011	Argued. For petitioner: Mark C. Fleming, Boston, Mass. For respondent: Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED

10-694 NOV 24 2010

OFFICE OF THE CLERK

No. 10-

IN THE

Supreme Court of the United States

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
PAUL R. Q. WOLFSON
JAMES L. QUARLES III
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

MARK C. FLEMING
Counsel of Record
MEGAN BARBERO
ELIZABETH KENT CULLEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

Library of Congress
Law Library

QUESTION PRESENTED

For more than 25 years, the Board of Immigration Appeals (BIA) held that a legal permanent resident (LPR) who is deportable due to a criminal conviction could seek a discretionary waiver of removal under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. §1182(c), provided that the conviction also would have constituted a waivable basis for exclusion. In 2005, the BIA abruptly changed course, adding a requirement that the LPR be deportable under a statutory provision that used "similar language" to an exclusion provision. Deportable LPRs who departed and reentered the United States after their conviction, however, may seek Section 212(c) relief under a longstanding "*nunc pro tunc*" procedure that does not turn on similar language between deportation and exclusion provisions. Thus, under the BIA's current view, an LPR who pled guilty to an offense that renders him both deportable and excludable, but under provisions that use dissimilar phrasing, will be eligible for Section 212(c) relief from deportation if he departed and reentered the United States after his conviction, but ineligible if he did not depart. The circuits are split three ways on the lawfulness of the BIA's new interpretation.

The question presented is:

Whether a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and excludable under differently phrased statutory subsections, but who did *not* depart and reenter the United States between his conviction and the commencement of removal proceedings, is categorically foreclosed from seeking discretionary relief from removal under former Section 212(c) of the INA.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 2

STATEMENT 5

A. Availability Of Discretionary Relief Before 2005 5

B. The BIA Changes Course In 2005 11

C. The Circuit Split 12

D. Proceedings Below 14

REASONS FOR GRANTING THE PETITION 17

I. THE APPLICATION OF SECTION 212(C) TO DEPORTABLE LPRS HAS FULLY PERCOLATED AND PRODUCED AN INTRACTABLE THREE-WAY CIRCUIT SPLIT 18

II. THE NINTH CIRCUIT'S AND BIA'S DECISIONS INCORRECTLY AND UNCONSTITUTIONALLY RESTRICT THE SCOPE OF SECTION 212(C) RELIEF 21

III. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL AND CONTINUING IMPORTANCE TO NUMEROUS LEGAL PERMANENT RESIDENTS 31

TABLE OF CONTENTS—Continued

Page

CONCLUSION 33

APPENDIX A: Unpublished Opinion of the United States Court of Appeals for the Ninth Circuit in *Judulang* v. *Gonzales*, dated September 17, 2007 ..... 1a

APPENDIX B: Decision of the Board of Immigration Appeals in *In re Judulang*, dated February 3, 2006 ..... 5a

APPENDIX C: Oral Decision of the Immigration Judge, dated September 28, 2005 ..... 11a

APPENDIX D: Order of the United States Court of Appeals for the Ninth Circuit denying petition for rehearing and petition for rehearing en banc, dated August 26, 2010 ..... 21a

APPENDIX E: Statutory provisions:

8 U.S.C. §1101(a)(43) 23a

Section 212(a) of the Immigration and Nationality Act, codified at 8 U.S.C. §1182(a) 23a

Former Section 212(c) of the Immigration and Nationality Act, codified at 8 U.S.C. §1182(c) (1996), repealed April 1, 1997 ..... 24a

Section 237 (formerly Section 241) of the Immigration and Nationality Act, codified at 8 U.S.C. §1227 ..... 25a

APPENDIX F: Regulatory provision:

8 C.F.R. §1212.3(f)(5) 27a

TABLE OF CONTENTS—Continued

Page

APPENDIX G: Military service record of Januario Judulang 29a

APPENDIX H: California Superior Court sentencing report, dated October 16, 1989 ..... 31a

APPENDIX I: Immigration and Naturalization Service notice of additional charges for removal, dated August 16, 2005 ..... 33a

APPENDIX J: Excerpts of Transcript of Hearing before Immigration Judge, dated September 28, 2005 ..... 35a

APPENDIX K: Order of the Supreme Court of the United States staying judgment of the United States Court of Appeals for the Ninth Circuit, dated September 16, 2010 ..... 39a

APPENDIX L: Decision of the Board of Immigration Appeals in *Matter of Rowe*, dated May 9, 2003 ..... 41a

APPENDIX M: Decision of the Board of Immigration Appeals in *Matter of Munoz*, dated August 7, 2003 ..... 45a

APPENDIX N: Decision of the Board of Immigration Appeals in *Matter of S-Lei*, dated May 27, 2004 ..... 57a

APPENDIX O: Decision of the Board of Immigration Appeals in *Matter of Rangel-Zuazo*, dated May 25, 2005 ..... 59a

APPENDIX P: Decision of the United States Court of Appeals for the Ninth Circuit in *Abebe* v. *Mukasey*, dated January 5, 2009 ..... 63a

TABLE OF CONTENTS—Continued

Page

APPENDIX Q: Representative cases addressing Section 212(c) eligibility in light of *Matter of Blake* 95a

TABLE OF AUTHORITIES

CASES

Page(s)

Abebe v. *Gonzales*, 493 F.3d 1092 (9th Cir. 2007), *vacated*, *Abebe* v. *Mukasey*, 514 F.3d 909 (9th Cir. 2008) 19, 26

Abebe v. *Holder*, 577 F.3d 1113 (9th Cir. 2009) 14, 21

Abebe v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009), *cert. denied sub nom. Abebe* v. *Holder*, 130 S. Ct. 3272 (2010) ..... *passim*

Aguilar-Ramos v. *Holder*, 594 F.3d 701 (9th Cir. 2010) 14

Anwo v. *INS*, 607 F.2d 435 (D.C. Cir. 1979) 7

Blake v. *Carbone*, 489 F.3d 88 (2d Cir. 2007) ..... *passim*

Boeing Co. v. *United States*, 537 U.S. 437 (2003) 22

Bowen v. *Georgetown University Hospital*, 488 U.S. 204 (1988) 31

Cabasug v. *INS*, 847 F.2d 1321 (9th Cir. 1988) 25

Campos v. *INS*, 961 F.2d 309 (1st Cir. 1992) 8

Caroleo v. *Gonzales*, 476 F.3d 158 (3d Cir. 2007) 13, 19

Carrasco-Favela v. *INS*, 563 F.2d 1220 (5th Cir. 1977) 7

Cato v. *INS*, 84 F.3d 597 (2d Cir. 1996) 8

Chiravacharadhikul v. *INS*, 645 F.2d 248 (4th Cir. 1981) 7

City of Cleburne v. *Cleburne Living Center*, 473 U.S. 432 (1985) 27

TABLE OF AUTHORITIES—Continued

Page(s)

Dalombo Fontes v. *Gonzales*, 483 F.3d 115 (1st Cir. 2007) 27

De Araujo v. *Gonzales*, 457 F.3d 146 (1st Cir. 2006) 11

De la Rosa v. *Attorney General*, 579 F.3d 1327 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010) 12, 13, 14, 18, 19

Drax v. *Reno*, 338 F.3d 98 (2d Cir. 2003) 8

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 22

Falaniko v. *Mukasey*, 272 F. App'x 742 (10th Cir. 2008) (unpublished) 13

Farquharson v. *Attorney General*, 246 F.3d 1317 (11th Cir. 2001) 8

Flores-Pelayo v. *Holder*, 2010 WL 3469223 (9th Cir. Sept. 3, 2010) 14

Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976) ..... *passim*

Gjonaj v. *INS*, 47 F.3d 824 (6th Cir. 1995) 8

Gonzalez-Mesias v. *Holder*, 129 S. Ct. 2042 (2009) 33

Hem v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006) 11

INS v. *St. Cyr*, 533 U.S. 289 (2001) ..... *passim*

Judulang v. *Chertoff*, 535 F. Supp. 2d 1129 (S.D. Cal. 2008) 16

Katsis v. *INS*, 997 F.2d 1067 (3d Cir. 1993) 7

Kim v. *Gonzales*, 468 F.3d 58 (1st Cir. 2006) 13, 19, 27

TABLE OF AUTHORITIES—Continued

Page(s)

Koussan v. *Holder*, 556 F.3d 403 (6th Cir. 2009), *reh'g and reh'g en banc denied* (May 29, 2009) 13

Leal-Rodriguez v. *INS*, 990 F.2d 939 (7th Cir. 1993) 8

Lorillard v. *Pons*, 434 U.S. 575 (1978) 22

Lovan v. *Holder*, 574 F.3d 990 (8th Cir. 2009) 20

Lozada v. *INS*, 857 F.2d 10 (1st Cir. 1988) 7

Mathews v. *Diaz*, 426 U.S. 67 (1976) 27

Matter of A-A-, 20 I. & N. Dec. 492 (BIA 1992) 10

Matter of Arias-Uribe, 13 I. & N. Dec. 696 (BIA 1971), *aff'd*, 466 F.2d 1198 (9th Cir. 1972) 6

Matter of Ashley, 2003 WL 23521830 (BIA Nov. 4, 2003) 10

Matter of Banuelos-Delena, 2006 WL 901335 (BIA Mar. 2, 2006) 12

Matter of Blake, 23 I. & N. Dec. 722 (BIA 2005) 3, 11, 25, 30, 31

Matter of Brieva-Perez, 23 I. & N. Dec. 766 (BIA 2005) 11

Matter of Cardona, 2005 WL 3709244 (BIA Dec. 27, 2005), *appeal docketed*, No. 08-70736 (9th Cir. Feb. 22, 2008) 3, 12, 25, 32

Matter of Caro-Lozano, 2004 WL 1398661 (BIA Apr. 22, 2004) 10

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of Esposito, 21 I. & N. Dec. 1 (BIA 1995) 8

Matter of Fuentes-Campos, 21 I. & N. Dec. 905 (BIA 1997) 28

Matter of G-A-, 7 I. & N. Dec. 274 (BIA 1956) 6, 20, 21, 26

Matter of Gomez-Perez, 2006 WL 901334 (BIA Mar. 1, 2006), *appeal docketed*, No. 07-72569 (9th Cir. June 27, 2007) 12

Matter of Granados, 16 I. & N. Dec. 726 (BIA 1979) 8

Matter of Hernandez-Casillas, 20 I. & N. Dec. 262 (Att'y Gen. 1991), *aff'd without op.*, 983 F.2d 231 (5th Cir. 1993) 8, 30

Matter of Hussein, 2004 WL 1059601 (BIA Mar. 15, 2004) 10

Matter of Jimenez-Santillano, 21 I. & N. Dec. 567 (BIA 1996) 7

Matter of L-, 1 I. & N. Dec. 1 (Att'y Gen. 1940) 6, 22

Matter of Loney, 2004 WL 1167256 (BIA Feb. 10, 2004) 10

Matter of Marin, 16 I. & N. Dec. 581 (BIA 1978) 31

Matter of Martinez, 2004 WL 1167082 (BIA Feb. 18, 2004) 10

Matter of Meza, 20 I. & N. Dec. 257 (BIA 1991) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of Montenegro, 20 I. & N. Dec. 603 (BIA 1992) 8

Matter of Moreno-Escobosa, 25 I. & N. Dec. 114 (BIA 2009) 14

Matter of Munoz, No. A35279774, 28 Immig. Rptr. B1-1 (BIA Aug. 7, 2003) 10

Matter of Orrosquieta, 2003 WL 23508672 (BIA Dec. 19, 2003) 10

Matter of Rangel-Zuazo, No. A90640428 (BIA May 25, 2005), *appeal docketed*, No. 07-72316 (9th Cir. June 11, 2007) 12

Matter of Reyes Manzueta, 2003 WL 23269892 (BIA Dec. 1, 2003) 10, 24

Matter of Rodriguez-Cortes, 20 I. & N. Dec. 587 (BIA 1992) 10

Matter of Rodriguez-Symonds, 2004 WL 880246 (BIA Mar. 9, 2004) 10

Matter of Rowe, No. 37749964 (BIA May 9, 2003) 10

Matter of S-, 6 I. & N. Dec. 392 (BIA 1955) 22

Matter of S-Lei, No. A38139424 (BIA May 27, 2004) 10

Matter of Silva, 16 I. & N. Dec. 26 (BIA 1976) 7

Matter of Umer, 2010 WL 1606998 (BIA Mar. 31, 2010), *appeal docketed*, No. 10-60342 (5th Cir. Apr. 19, 2010) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Microsoft Corp. v. *United States*, 530 U.S. 1301 (2000) 33

Rodriguez-Reyes v. *INS*, 1993 WL 8150 (6th Cir. Jan. 15, 1993) (unpublished) 7

Rosario v. *INS*, 962 F.2d 220 (2d Cir. 1992) 27

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 16

Sito v. *Holder*, 2010 WL 2782852 (9th Cir. July 13, 2010) 14

St. Cyr v. *INS*, 229 F.3d 406 (2d Cir. 2000), *aff'd*, 533 U.S. 289 (2001) 25

Tapia-Acuna v. *INS*, 449 U.S. 945 (1980) 7

Tapia-Acuna v. *INS*, 640 F.2d 223 (9th Cir. 1981), *overruled*, *Abebe* v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009) 7

United States v. *Ortega-Ascanio*, 376 F.3d 879 (9th Cir. 2004) 11

United States v. *Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004) 11

Valere v. *Gonzales*, 473 F.3d 757 (7th Cir. 2007) 13

Varela-Blanco v. *INS*, 18 F.3d 584 (8th Cir. 1994) 7

Variamparambil v. *INS*, 831 F.2d 1362 (7th Cir. 1987) 7

Vissian v. *INS*, 548 F.2d 325 (10th Cir. 1977) 7

Vo v. *Gonzales*, 482 F.3d 363 (5th Cir. 2007) 13

Vue v. *Gonzales*, 496 F.3d 858 (8th Cir. 2007) 13. 19

TABLE OF AUTHORITIES—Continued

Page(s)

Wong Wing v. *United States*, 163 U.S. 228 (1896) 27

Yeung v. *INS*, 76 F.3d 337 (11th Cir. 1995) 7

Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 27

STATUTES AND REGULATIONS

5 U.S.C. §706(2) 26

Immigration and Nationality Act, 8 U.S.C.
- §§1101 *et seq.* 2
- §1101(a)(43) 2
- §1101(a)(43)(A) 10
- §1101(a)(43)(F) 10, 15
- §1182(a) 2, 3
- §1182(c) (1996) 2
- §1182(c) ..... i, 5
- §1227(a) 2, 3
- §1227(a)(2)(A) 15
- §1227(a)(2)(A)(iii) 9
- §1432(a) (1988) 15

28 U.S.C.
- §455(b)(3) 33
- §1254(1) 2

Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 5

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 23

Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-548 (1996) 3, 9

TABLE OF AUTHORITIES—Continued

Page(s)

8 C.F.R.
§1212.3 14
§1212.3(f)(5) 2, 9, 29

Cal. Penal Code §192(a) 15

LEGISLATIVE MATERIALS

136 Cong. Rec. S6586 (daily ed. May 19, 1990) (statement of Sen. Dole) .....

AGENCY MATERIALS

69 Fed. Reg. 57,826 (Sept. 28, 2004) 30, 31

OTHER AUTHORITIES

Aleinikoff, Martin, & Motomura, *Immigration: Process & Policy* (3d ed. 1995) 8

Duff, *Judicial Business of the United States Courts: 2009 Annual Report of the Director*, Table B-3 (2010), *at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinespdfversion.pdf .. 13, 20, 21

6 Gordon, Mailman & Yale-Loehr, *Immigration Law & Procedure* (2007) 30

IN THE

Supreme Court of the United States

No. 10-

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Joel Judulang respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' decision is unreported but available at 2007 WL 2733726. App. 1a-4a. The order dated August 26, 2010 denying rehearing and rehearing en banc is unreported. App. 21a.

The oral decision of the Immigration Judge (IJ) ordering Petitioner removed from the United States is unreported. App. 11a-20a. The decision of the Board of

Immigration Appeals (BIA) affirming the IJ's order is unreported but available at 2006 WL 557842. App. 5a-9a.

JURISDICTION

The court of appeals' judgment was entered on September 17, 2007. App. 1a. Rehearing was denied on August 26, 2010. App. 21a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law[.]"

2. The following provisions of the Immigration and Nationality Act, 8 U.S.C. §§1101 *et seq.*, are set forth in relevant part in the Appendix hereto:

a. 8 U.S.C. §1101(a)(43) (App. 23a);

b. 8 U.S.C. §1182(a) (App. 23a-24a);

c. 8 U.S.C. §1182(c) (1996) (repealed Apr. 1, 1997) (App. 24a-25a); and

d. 8 U.S.C. §1227(a) (App. 25a-26a).

3. 8 C.F.R. §1212.3(f)(5) is reproduced at App. 27a.

INTRODUCTION

This case presents an important question of immigration law on which the courts of appeals have split three ways. Prior to 2005, the BIA had repeatedly held that individuals in Petitioner's position could seek discretionary relief from removal under former Section

212(c) of the Immigration and Nationality Act (INA).[1] That year, however, reacting to this Court's reaffirmance of the availability of Section 212(c) relief to certain aliens (*see INS* v. *St. Cyr*, 533 U.S. 289, 326 (2001)), the BIA sought to curtail Section 212(c) relief in a way that disqualified numerous previously eligible individuals, including Petitioner. Purporting to interpret a 2004 regulation promulgated to implement *St. Cyr*, the BIA ruled that deportable lawful permanent residents (LPRs) who had *not* traveled abroad after their convictions could only seek discretionary relief if the government charged them under a deportation provision in the INA that used *similar language* to an exclusion provision. *Matter of Blake*, 23 I. & N. Dec. 722 (BIA 2005). The BIA has acknowledged that *Blake* was a "change in law." *E.g.*, *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005), *appeal docketed*, No. 08-70736 (9th Cir. Feb. 22, 2008).

The practical result was suddenly to foreclose Section 212(c) relief for large numbers of LPRs whose attachment to the United States was so strong that they had not left the country following their conviction.

---

[1] Before April 1, 1997, the INA distinguished between deportation proceedings, applicable to individuals already present in the United States, and exclusion proceedings, applicable to individuals seeking to enter the United States. The Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, §304, 110 Stat. 3009-548, 3009-589 (1996) (IIRIRA), replaced both with "removal" proceedings and replaced the term "excludable" with "inadmissible." Nonetheless, the statutory distinction between the two categories of individuals remains. *Compare* 8 U.S.C. §1182(a) (defining class of inadmissible individuals) *with* 8 U.S.C. §1227(a) (defining class of deportable individuals). The terms "deportation" and "exclusion" and their variants are used where necessary to the analysis under former Section 212(c).

Meanwhile, under an established BIA practice that Congress has long accepted, Section 212(c) relief remained available to similarly situated LPRs who *did* leave the country following their conviction, reentered the United States, and were subsequently charged as deportable. Under 60-year-old precedents, such individuals may seek Section 212(c) relief "*nunc pro tunc*," as long as they are deportable for an offense that would have rendered them inadmissible upon reentry.

The circuits are split three ways as to the lawfulness of the BIA's new approach. The Second Circuit has correctly rejected the BIA's new position as resting on an irrational distinction. The Ninth Circuit, in a sharply divided en banc decision, ruled that Section 212(c) does not apply to deportable LPRs at all—a position that neither the BIA nor the government has ever endorsed and that directly conflicts with *St. Cyr*. Eight other circuits have affirmed the BIA's new approach.

Although Section 212(c) was repealed in 1996, it remains of critical importance to numerous longstanding residents of this country, many of whom—like Mr. Judulang—have worked hard for many years, have the support of U.S. citizen family members who in turn depend on them for support, have U.S. citizen children, and have made valuable contributions to their communities. The BIA would now deny these individuals the right to apply for relief that previously was available and that this Court reaffirmed in *St. Cyr*, based solely on the arbitrary nature of their travel history. Moreover, the three-way circuit split means that eligibility for relief currently depends on which circuit hears the appeal.

Although this question was twice presented last Term, neither case proved an adequate vehicle, perhaps because Justice Kagan acted as counsel for the government in both cases. This case poses no such problem. Accordingly, this Court should grant certiorari to review the judgment of the Ninth Circuit and bring much-needed uniformity to this important question.

STATEMENT

A. Availability Of Discretionary Relief Before 2005

Prior to its repeal, Section 212(c) provided: "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General[.]" 8 U.S.C. §1182(c).

Although the terms of Section 212(c) envision relief only for *excludable* LPRs, it has long been applicable to persons who, like Mr. Judulang, are *deportable* due to convictions that would also render them excludable.

1. Section 212(c)'s predecessor was the Seventh Proviso to Section 3 of the Immigration Act of 1917, which permitted a discretionary waiver of exclusion for "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years." Pub. L. No. 64-301, 39 Stat. 874, 878. "Although that provision applied literally only to exclusion proceedings, and although the deportation provisions of the statute did not contain a similar provision, the INS relied on [the Seventh Proviso] to grant relief *in deportation proceedings* involving aliens who had departed and returned to this country after the ground for de-

portation arose." *St. Cyr*, 533 U.S. at 294 (emphasis added). The law treated the deportable LPR as if he had been placed in exclusion proceedings upon reentry, such that relief was available "*nunc pro tunc*." *Matter of L-*, 1 I. & N. Dec. 1, 5-6 (Att'y Gen. 1940).

2. Section 212 of the Immigration and Nationality Act of 1952 "replaced and roughly paralleled §3 of the 1917 Act." *St. Cyr*, 533 U.S. at 294. Its discretionary relief provision, Section 212(c), closely tracked the Seventh Proviso. The BIA soon ruled that Section 212(c) permitted relief for LPRs in deportation proceedings who had departed and reentered after a criminal conviction and before being placed in deportation proceedings. *Matter of G-A-*, 7 I. & N. Dec. 274, 276 (BIA 1956). The BIA also made clear that, if Section 212(c) "is exercised to waive a ground of inadmissibility based upon a criminal conviction, a deportation proceeding cannot thereafter be properly instituted based upon the same criminal conviction." *Id.* at 275.

The BIA initially refused to permit deportable LPRs who had *not* traveled abroad after conviction to seek Section 212(c) relief. *Matter of Arias-Uribe*, 13 I. & N. Dec. 696, 697-698 (BIA 1971), *aff'd*, 466 F.2d 1198 (9th Cir. 1972) (per curiam). In 1976, the Second Circuit rejected that approach, ruling that LPRs who had traveled abroad and those who had not were "in like circumstances, but for irrelevant and fortuitous factors," and therefore equal protection required that they be "treated in a like manner." *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976). The Second Circuit noted that the government had proffered no reason to distinguish between LPRs based on a "failure to travel abroad following ... conviction" and concluded that "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed

after his initial entry should receive at least as much consideration as an individual who may leave and return[.]" *Id.* The BIA and all courts of appeals followed *Francis*.[2]

Although *Francis* made Section 212(c) relief available to many deportable LPRs, it did not apply to LPRs who were deportable for convictions that *did not* make them inadmissible. Persons in that situation would not have been eligible for Section 212(c) relief *nunc pro tunc* even if they *had* departed and reentered, and there was accordingly no irrational distinction in denying relief in such cases. *See, e.g., Matter of Jimenez-Santillano*, 21 I. & N. Dec. 567, 575 (BIA 1996) (stating that Section 212(c) relief was not available "to an alien in deportation proceedings when that same alien would not have occasion to seek such relief were he in exclusion proceedings instead").

---

[2] *See St. Cyr*, 533 U.S. at 295; *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976); *see also Anwo* v. *INS*, 607 F.2d 435, 436 n.3 (D.C. Cir. 1979) (per curiam); *Lozada* v. *INS*, 857 F.2d 10, 11 n.1 (1st Cir. 1988); *Katsis* v. *INS*, 997 F.2d 1067, 1070 (3d Cir. 1993); *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 248 n.1 (4th Cir. 1981); *Carrasco-Favela* v. *INS*, 563 F.2d 1220, 1221 n.3 (5th Cir. 1977) (per curiam); *Rodriguez-Reyes* v. *INS*, 1993 WL 8150, at *2 (6th Cir. Jan. 15, 1993) (unpublished); *Variamparambil* v. *INS*, 831 F.2d 1362, 1364 n.1 (7th Cir. 1987); *Varela-Blanco* v. *INS*, 18 F.3d 584, 586 (8th Cir. 1994) (per curiam); *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981), *overruled*, *Abebe* v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam) (App. 63a-94a), *cert. denied sub nom. Abebe* v. *Holder*, 130 S. Ct. 3272 (2010); *Vissian* v. *INS*, 548 F.2d 325, 328 nn.2-3 (10th Cir. 1977); *Yeung* v. *INS*, 76 F.3d 337, 340 n.4 (11th Cir. 1995); *accord Tapia-Acuna* v. *INS*, 449 U.S. 945 (1980) (vacating and remanding in light of Solicitor General's change of position); *Abebe*, App. 85a (Thomas, J., dissenting) (noting government's concession in *Tapia-Acuna* that *Francis* was correct).

That limitation came to be known as the "statutory counterpart" rule: Section 212(c) relief was available in removal proceedings if the LPR was deportable for a conviction that fell under a "counterpart" exclusion provision. Because most crimes that are grounds for deportation are also grounds for exclusion, the statutory counterpart rule was satisfied by all but a limited group of LPRs—generally, only those deportable for certain firearms convictions[3] and entry without inspection.[4] The Attorney General stated as much in 1991, when he identified only "two grounds for deportation [that] have no analogue in the grounds for exclusion," namely entry without inspection and firearms offenses. *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 282 n.4 (Att'y Gen. 1991), *aff'd without op.*, 983 F.2d 231 (5th Cir. 1993); *see also* Aleinikoff, Martin, & Motomura, *Immigration: Process & Policy* 703-704 (3d ed. 1995) ("The two most significant deportation grounds without comparable exclusion grounds are entry without inspection and firearms violations.").

3. In 1996, Congress repealed Section 212(c). Illegal Immigration Reform and Immigrant Responsibility

---

[3] *See, e.g.*, *Drax* v. *Reno*, 338 F.3d 98, 101, 108-109 (2d Cir. 2003); *Cato* v. *INS*, 84 F.3d 597, 600 (2d Cir. 1996); *Gjonaj* v. *INS*, 47 F.3d 824, 825, 827 (6th Cir. 1995); *Campos* v. *INS*, 961 F.2d 309, 311-314 (1st Cir. 1992); *Matter of Esposito*, 21 I. & N. Dec. 1, 9-10 (BIA 1995); *Matter of Montenegro*, 20 I. & N. Dec. 603, 605-606 (BIA 1992); *Matter of Granados*, 16 I. & N. Dec. 726, 728-729 (BIA 1979).

[4] *See, e.g.*, *Farquharson* v. *Attorney Gen.*, 246 F.3d 1317, 1325 (11th Cir. 2001); *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 948, 952 (7th Cir. 1993); *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 281, 286-287 (Att'y Gen. 1991), *aff'd without op.*, 983 F.2d 231 (5th Cir. 1993).

Act, Pub. L. No. 104-208, §304(b), 110 Stat. 3009-548, 3009-597 (1996) (IIRIRA). In 2001, this Court held that the repeal was prospective only and that LPRs who were deportable on account of convictions obtained through guilty pleas prior to April 1, 1997 (IIRIRA's effective date) could still seek Section 212(c) relief. *See St. Cyr*, 533 U.S. at 326.

In 2004, the Department of Justice (DOJ) promulgated a regulation implementing *St. Cyr* and setting out the criteria for Section 212(c) relief. The regulation included a statutory counterpart requirement. 8 C.F.R. §1212.3(f)(5) ("An application for relief under former section 212(c) of the Act shall be denied if ... [t]he alien is deportable ... on a ground which does not have a statutory counterpart in section 212 of the Act.").

4. Up to and including 2004, the BIA repeatedly held that persons deportable for certain "aggravated felonies" (*see* 8 U.S.C. §1227(a)(2)(A)(iii)) satisfied the "statutory counterpart" requirement, generally because the crime of conviction was also a "crime involving moral turpitude" (CIMT) that would render the LPR inadmissible under Section 212(a)(2)(A)(i). Although the provisions governing inadmissibility did not list aggravated felonies as a basis for exclusion, the BIA held that a Section 212(c) waiver was "not unavailable to an alien convicted of an aggravated felony simply because there is no ground of exclusion which recites the words, 'convicted of an aggravated felony.'" *Matter of Meza*, 20 I. & N. Dec. 257, 259 (BIA 1991). The BIA accordingly ruled that LPRs could seek waivers of deportation for aggravated felony convictions, including "crimes of violence" under 8 U.S.C.

§1101(a)(43)(F)[5] and "sexual abuse of a minor" under §1101(a)(43)(A).[6] The courts of appeals likewise noted

---

[5] *See, e.g., Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 590-591 (BIA 1992) (LPR convicted of attempted murder "is not barred from applying for section 212(c) relief"); *Matter of A-A-*, 20 I. & N. Dec. 492, 500-501 (BIA 1992) (LPR convicted of murder was not disqualified from seeking Section 212(c) relief on that basis); *Matter of S-Lei*, No. A38139424 (BIA May 27, 2004) (App. 57a-58a) (affirming grant of Section 212(c) relief to LPR convicted of attempted robbery, a crime of violence); *Matter of Reyes Manzueta*, 2003 WL 23269892 (BIA Dec. 1, 2003) (affirming Section 212(c) waiver of conviction for voluntary manslaughter, a crime of violence); *see also Matter of Caro-Lozano*, 2004 WL 1398661 (BIA Apr. 22, 2004) (reaching merits of Section 212(c) application in crime of violence case); *Matter of Hussein*, 2004 WL 1059601 (BIA Mar. 15, 2004) (remanding for consideration of Section 212(c) relief where conviction was a crime of violence); *Matter of Martinez*, 2004 WL 1167082 (BIA Feb. 18, 2004) ("[I]t does appear that Section 212(c) could waive the burglary offense[.]"); *Matter of Loney*, 2004 WL 1167256 (BIA Feb. 10, 2004) (LPR convicted of crime of violence was "not precluded" from seeking Section 212(c) relief where crime was also a CIMT); *Matter of Orrosquieta*, 2003 WL 23508672 (BIA Dec. 19, 2003) (recognizing that petitioner deportable for extortion, a crime of violence, would be "entitled" to seek Section 212(c) relief); *Matter of Munoz*, No. A35279774, 28 Immig. Rptr. B1-1 (BIA Aug. 7, 2003) (App. 45a-55a) (remanding for consideration of Section 212(c) relief where the crime of violence was also a CIMT); *Matter of Rowe*, No. 37749964 (BIA May 9, 2003) (App. 41a-44a) (rejecting government's argument that crime of violence was not waivable).

[6] *See, e.g., Hussein*, 2004 WL 1059601 (LPR convicted of indecency with a child was eligible for Section 212(c) relief because he could have been excluded due to a CIMT); *Matter of Rodriguez-Symonds*, 2004 WL 880246 (BIA Mar. 9, 2004) (remanding for consideration of whether LPR convicted of lewd act upon child was eligible for Section 212(c) relief because conviction was also CIMT); *Matter of Ashley*, 2003 WL 23521830 (BIA Nov. 4, 2003) (noting apparent Section 212(c) eligibility for LPR convicted of sexual offense against a child).

the availability of Section 212(c) relief in such cases. *See e.g.*, *Hem* v. *Maurer*, 458 F.3d 1185, 1187-1189 (10th Cir. 2006) (crime of violence); *De Araujo* v. *Gonzales*, 457 F.3d 146, 154-155 (1st Cir. 2006) (crime of violence); *United States* v. *Ortega-Ascanio*, 376 F.3d 879, 886-887 (9th Cir. 2004) (sexual battery); *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042, 1051 (9th Cir. 2004) (burglary). This Court also recognized the importance of Section 212(c) in aggravated felony "crime of violence" cases. *St. Cyr*, 533 U.S. at 295-296 & n.4.

B. The BIA Changes Course In 2005

In 2005, the BIA abruptly changed the rules. In *Blake*, the BIA decided that an LPR who was deportable for a "sexual abuse of a minor" aggravated felony was categorically ineligible for Section 212(c) relief, regardless of whether the crime would provide a basis for inadmissibility as a CIMT. 23 I. & N. Dec. at 727-728. Without addressing its numerous decisions upholding discretionary waivers in similar circumstances, the BIA held that the "statutory counterpart" requirement could only be satisfied if the LPR was deportable under a subsection of INA §237 that was *phrased* similarly to an inadmissibility subsection in INA §212(a). *Id.* at 728. The BIA barred the LPR in *Blake* from applying for relief because the words "sexual abuse of a minor" do not appear in any inadmissibility provision. *Id.* at 728-729. The BIA did not consider whether Blake's conviction would have rendered him excludable and therefore eligible to seek Section 212(c) relief *nunc pro tunc* had he left the country and reentered. The BIA later applied the same reasoning to "crime of violence" aggravated felonies. *Matter of Brieva-Perez*, 23 I. & N. Dec. 766 (BIA 2005).

The BIA acknowledged that *Blake* was a retroactive change in its Section 212(c) jurisprudence—a fact that was confirmed by its later reversal of decisions to grant relief under the prior (correct) approach to Section 212(c). In one case, the BIA itself had affirmed an IJ's decision granting relief, but then vacated its decision on the government's motion, referring to *Blake* as "a *change in law* that appears to preclude a grant of 212(c) relief." *Cardona*, 2005 WL 3709244 (emphasis added); *see also Matter of Gomez-Perez*, 2006 WL 901334 (BIA Mar. 1, 2006) (vacating IJ's decision to grant Section 212(c) waiver because LPR is "no longer eligible for relief"), *appeal docketed*, No. 07-72569 (9th Cir. June 27, 2007); *Matter of Rangel-Zuazo*, No. A90640428 (BIA May 25, 2005) (App. 59a-61a) (reversing IJ's decision to grant relief because "intervening precedent renders the respondent statutorily ineligible for section 212(c) relief"), *appeal docketed*, No. 07-72316 (9th Cir. June 11, 2007); *Matter of Banuelos-Delena*, 2006 WL 901335 (BIA Mar. 2, 2006) (reversing grant of Section 212(c) relief and citing "intervening Board precedent"); *Matter of Umer*, 2010 WL 1606998 (BIA Mar. 31, 2010) (referring to rule "announced in" *Brieva-Perez*), *appeal docketed*, No. 10-60342 (5th Cir. Apr. 19, 2010); *cf. De la Rosa* v. *Attorney Gen.*, 579 F.3d 1327, 1332 (11th Cir. 2009) (calling *Blake* a "watershed moment in [Section] 212(c) jurisprudence"), *cert. denied*, 130 S. Ct. 3272 (2010).

C. The Circuit Split

The courts of appeals have divided three ways in response to *Blake*. Although the BIA claimed to base *Blake* on Second Circuit precedent, that court reversed the BIA in *Blake* itself. *Blake* v. *Carbone*, 489 F.3d 88, 103 (2d Cir. 2007). In 2009, the Second Circuit heard

more than 21% of the total number of appeals from the BIA. *See* Duff, *Judicial Business of the United States Courts: 2009 Annual Report of the Director*, Table B-3 (2010), *at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinespdfversion.pdf (*2009 Annual Report*).

Eight other courts of appeals, which together heard over 30% of all appeals from the BIA (*2009 Annual Report* at Table B-3), have affirmed the BIA's *Blake* rule.[7] Finally, the Ninth Circuit, which heard over 44% of the appeals from the BIA (*id.*), recently ruled that Section 212(c) relief is unavailable to all deportable LPRs. Neither the government nor the BIA advocated that position, which was announced in a fractured en banc ruling that overturned more than a quarter-century of Circuit precedent. *Abebe* v. *Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc) (per curiam) (App. 63a-94a), *cert. denied*, 130 S. Ct. 3272 (2010). Seven judges dissented from the Ninth Circuit's denial of full court rehearing, asserting that "[i]f ever a case merited full court en

---

[7] *Kim* v. *Gonzales*, 468 F.3d 58, 63 (1st Cir. 2006); *Caroleo* v. *Gonzales*, 476 F.3d 158, 167-168 (3d Cir. 2007); *Vo* v. *Gonzales*, 482 F.3d 363, 368-369 (5th Cir. 2007); *Koussan* v. *Holder*, 556 F.3d 403, 412-414 (6th Cir. 2009), *reh'g and reh'g en banc denied* (May 29, 2009); *Valere* v. *Gonzales*, 473 F.3d 757, 762 (7th Cir. 2007); *Vue* v. *Gonzales*, 496 F.3d 858, 862-863 (8th Cir. 2007); *Falaniko* v. *Mukasey*, 272 F. App'x 742, 746-748 (10th Cir. 2008) (unpublished); *De la Rosa*, 579 F.3d at 1337.

banc consideration, this one did." *Abebe* v. *Holder*, 577 F.3d 1113 (9th Cir. 2009) (Berzon, J., dissenting).[8]

Petitions for certiorari were filed in *Abebe* and *De la Rosa*, an Eleventh Circuit case raising the same issue. *De la Rosa* was relisted twice; *Abebe* was relisted once. On May 10, 2010, the President announced the nomination to this Court of then-Solicitor General Kagan, who was counsel for the government in *Abebe* and *De la Rosa*. Both petitions were denied at the subsequent Conference. *De la Rosa* v. *Holder*, 130 S. Ct. 3272 (2010) (No. 09-594); *Abebe* v. *Holder*, 130 S. Ct. 3272 (2010) (No. 09-600).

D. Proceedings Below

Petitioner Joel Judulang, a native of the Philippines, entered the United States in 1974 at the age of eight. He has continuously resided in this country for thirty-six years, returning to the Philippines only once to attend his grandmother's funeral more than twenty years ago.

Mr. Judulang and his family have lengthy and close connections with the United States. His grandfather

---

[8] The Ninth Circuit in *Abebe* suggested that deportable LPRs could still seek relief under the 2004 regulation (*see* App. 69a-70a), and the BIA has agreed (*Matter of Moreno-Escobosa*, 25 I. & N. Dec. 114, 116-117 (BIA 2009)). The Ninth Circuit's own application of the holding in *Abebe* has been inconsistent, however. *Compare Flores-Pelayo* v. *Holder*, 2010 WL 3469223 (9th Cir. Sept. 3, 2010) (rejecting ineffective assistance of counsel claim based on section 212(c) because *Abebe* rendered LPR in deportation proceedings "statutorily ineligible") *and Sito* v. *Holder*, 2010 WL 2782852 (9th Cir. July 13, 2010) *with Aguilar-Ramos* v. *Holder*, 594 F.3d 701, 706 (9th Cir. 2010) (applying statutory counterpart rule pursuant to 8 C.F.R. §1212.3).

served in the U.S. military in the Philippines between 1923 and 1948 (App. 29a-30a) and became a U.S. citizen as a result. His parents both naturalized as well. App. 36a-37a. He has a 14-year-old daughter who is also a native-born citizen of the United States, as are his four nephews and two nieces. His two sisters are U.S. citizens and his older brother is an LPR. Unfortunately, Mr. Judulang's parents did not seek to obtain citizenship for him before he turned 18.[9]

In 1988, when Mr. Judulang was 22 years old, he was involved in a fight in which another person shot and killed someone. Although Mr. Judulang was not the shooter, he was charged as an accessory. He pled guilty to voluntary manslaughter under Cal. Penal Code §192(a). App. 31a-32a. Due to his minor involvement in the crime and his cooperation with authorities, Mr. Judulang was given a suspended sentence of six years. *Id.* He was released on probation immediately following his plea.

On June 10, 2005, the government commenced deportation proceedings against Mr. Judulang. The IJ found Mr. Judulang deportable based *inter alia* on his conviction for voluntary manslaughter, which is an aggravated felony "crime of violence." App. 15a-16a; *see also* 8 U.S.C. §§1101(a)(43)(F), 1227(a)(2)(A). The IJ informed Mr. Judulang that Section 212(c) "could have been applied to your manslaughter conviction," but believed that the length of his sentence disqualified him

---

[9] Had Mr. Judulang's mother naturalized before Mr. Judulang turned 18, he would have become a U.S. citizen by operation of law. 8 U.S.C. §1432(a) (1988). She naturalized when he was 18 years and 11 months old. App. 36a-37a.

from Section 212(c) relief. App. 38a. The IJ stated that the sentence issue was "litigatable." *Id.*[10]

The BIA affirmed the deportation order, though it did not affirm the IJ's reasoning. Instead, it ruled that because Mr. Judulang was removable for a "crime of violence" aggravated felony, he was categorically ineligible for a Section 212(c) waiver under *Brieva-Perez*. App. 8a.

A panel of the Ninth Circuit denied Mr. Judulang's petition for review. App. 4a. His petition for rehearing and rehearing en banc was held in abeyance pending resolution of *Abebe* and ultimately denied on August 26, 2010. App. 21a. Justice Kennedy stayed the judgment of the Ninth Circuit pending the filing of a petition for certiorari. App. 39a.

While his case was pending in the Ninth Circuit, Mr. Judulang was released on bond from immigration custody following an order of the United States District Court for the Southern District of California. *Judulang* v. *Chertoff*, 535 F. Supp. 2d 1129 (S.D. Cal. 2008). Mr. Judulang lives with his elderly mother, a U.S. citizen, in Los Angeles and has been working to support himself and his family.

---

[10] As Mr. Judulang argued on appeal, the IJ's view that his six-year sentence disqualified him from Section 212(c) relief was erroneous. *See* Pet. C.A. Br. 36 n.17. Although the IJ also found Mr. Judulang deportable on account of a second conviction for grand theft over $400, neither the BIA nor the Ninth Circuit relied on that theory, and it is not before the Court. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943). Mr. Judulang has a substantial argument, preserved below, that he cannot be deported for the theft conviction should he be granted Section 212(c) relief regarding his manslaughter conviction. Pet. C.A. Br. 37-40.

REASONS FOR GRANTING THE PETITION

Section 212(c) continues to be an important source of relief for numerous legal permanent residents. *See INS* v. *St. Cyr*, 533 U.S. 289, 296 n.6 (2001). In the five and one-half years since *Blake*, the issue presented here has arisen in over 160 cases—including more than 30 appellate decisions this year—and produced published opinions in almost every circuit. App. 95a-105a (listing representative cases in which *Blake* or its progeny have been addressed). The circuits are irreconcilably split three ways on the proper application of Section 212(c) to LPRs deportable as a result of an aggravated felony conviction. This Court's guidance is urgently needed to restore a uniform application of Section 212(c).

The BIA's novel and unprecedented reinterpretation of the statutory counterpart test in *Blake*—ostensibly based on a 2004 regulation designed to implement this Court's ruling in *St. Cyr*—was in fact an evident effort to undermine *St. Cyr* and accomplish through agency and judicial decision what Congress had *not* done through legislation. The BIA's new approach creates an arbitrary and capricious distinction that is inconsistent with the settled interpretation of Section 212(c) and resurrects the unconstitutional practice of discriminating between similarly situated LPRs on the irrelevant basis of travel history. It also improperly gives retroactive effect to an (erroneous) interpretation of the 2004 regulation.

The Ninth Circuit's position is even more extreme, as it rejects three decades of consistent agency practice permitting deportable LPRs to seek discretionary relief under Section 212(c), regardless of travel history—a practice Congress unquestionably approved for dec-

ades. The Court should grant certiorari, reverse the judgment of the Ninth Circuit, and rule that Mr. Judulang may pursue Section 212(c) relief on the merits.

I. THE APPLICATION OF SECTION 212(c) TO DEPORTABLE LPRS HAS FULLY PERCOLATED AND PRODUCED AN INTRACTABLE THREE-WAY CIRCUIT SPLIT

Since the BIA's 2005 decision in *Blake*, ten courts of appeals have considered whether and under what circumstances an LPR who is deportable on the basis of an "aggravated felony" conviction is eligible for Section 212(c) relief. In answering this question, the courts of appeals have split three ways. *See Abebe*, App. 78a (Clifton, J., concurring in the judgment) (acknowledging "three-way circuit split"); *De la Rosa* v. *Attorney Gen.*, 579 F.3d 1327, 1335 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010).

First, the Second Circuit has recognized that the BIA's decision in *Blake* revived the equal protection problem—first identified in *Francis*—of giving *worse* treatment to LPRs who had *not* departed the United States. *Blake* v. *Carbone*, 489 F.3d 88, 102-104 (2d Cir. 2007). To cure the BIA's constitutional violation, the Second Circuit restored the law to its pre-2005 posture: Section 212(c) relief is available if the "particular offense" that rendered the LPR deportable "would render a similarly situated [LPR] excludable." *Id.* at 103. As the Second Circuit observed, "what makes one alien similarly situated to another is his or her act or offense, which is captured in the INA as either a ground of deportation or exclusion." *Id.* at 104 (explaining that equal protection principles "require[] [the court] to examine the circumstances of the deportable alien, rather than the language Congress used to classify his or her status"). The Second Circuit left to the BIA in the first

instance the task of determining whether a particular aggravated felony would render an LPR excludable. *Id.*[11]

Second, eight other courts of appeals have affirmed the BIA's formulaic approach in *Blake*. Instead of determining whether the underlying offense would also make the deportable LPR inadmissible, those circuits compare only the words used in the particular deportation provision charged by the government to the words used in the inadmissibility provisions of Section 212(a). *See, e.g., Caroleo* v. *Gonzales*, 476 F.3d 158, 164-165 (3d Cir. 2007). Under this "rather mechanical reading of the law," *Kim* v. *Gonzales*, 468 F.3d 58, 63 (1st Cir. 2006), Section 212(c) relief is only available if one of the inadmissibility provisions uses language that is substantially identical to the deportation provision charged. *E.g., De la Rosa*, 579 F.3d at 1338-1339. Because the inadmissibility provisions do not use the words "sexual abuse of a minor" or "crime of violence," LPRs who are charged as deportable under those provisions are held categorically ineligible for Section 212(c) relief, even if the underlying criminal conviction would render them inadmissible for having committed a "crime involving moral turpitude." *See, e.g., Caroleo*, 476 F.3d at 164-165.

---

[11] Judges in the Ninth Circuit and elsewhere have praised the Second Circuit's reasoning. *See, e.g., Abebe*, App. 83a-94a (Thomas, J., dissenting); *Vue* v. *Gonzales*, 496 F.3d 858, 863 (8th Cir. 2007) (Bye, J., concurring); *Abebe* v. *Gonzales*, 493 F.3d 1092, 1108-1109 (9th Cir. 2007) (Berzon, J., concurring), *vacated, Abebe* v. *Mukasey*, 514 F.3d 909 (9th Cir. 2008).

However, if LPRs with such convictions leave the country, they *can* seek Section 212(c) relief—either upon reentry if they are charged as inadmissible or *nunc pro tunc* if they are charged as deportable—as long as their conviction is for a crime that would make them inadmissible, such as a CIMT. *See Matter of G-A-*, 7 I. & N. Dec. 274, 276 (BIA 1956); *see also Lovan v. Holder*, 574 F.3d 990, 996 & n.5 (8th Cir. 2009) (noting that under the *nunc pro tunc* analysis, "the focus is on whether the [LPR] when he returned from a trip abroad was in fact excludable *for any reason*, including prior conviction of a crime involving moral turpitude").[12]

Third, the Ninth Circuit, in the fractured *Abebe* decision that also determined the outcome of Mr. Judulang's case, overruled decades of agency decisions and its own precedent to hold that Section 212(c) does not apply to deportable LPRs at all. App. 70a. Under that view, Section 212(c) relief should not even be available as a *nunc pro tunc* correction for deportable LPRs who traveled abroad between their convictions and the initiation of deportation proceedings. As the concurring and dissenting opinions in *Abebe* noted, the Ninth Circuit majority failed to observe *stare decisis*, ignored consistent agency practice applying Section 212(c) relief to deportable LPRs, and disregarded Congress's acceptance of that settled construction of the statute. *See* App. 72a-78a (Clifton, J., concurring in the judgment); App. 83a-94a (Thomas, J., dissenting). Moreover, the Ninth Circuit's position is irreconcilable with

---

[12] Although eight circuits have adopted *Blake*, those circuits heard less than 31% of the total number of petitions for review from the BIA in 2009, whereas the Second Circuit *alone* heard more than 21%. *See 2009 Annual Report* at Table B-3.

this Court's decision in *St. Cyr*, which arose out of the well-established availability of Section 212(c) relief to deportable LPRs like Messrs. St. Cyr and Judulang. *St. Cyr*, 533 U.S. at 293-296; *see also Abebe* v. *Holder*, 577 F.3d 1113, 1114 (9th Cir. 2009) (Berzon, J., dissenting from denial of full court rehearing) (Ninth Circuit's decision "conflict[s] with the necessary assumption" made by the Supreme Court in *St. Cyr*).[13]

II. THE NINTH CIRCUIT'S AND BIA'S DECISIONS INCORRECTLY AND UNCONSTITUTIONALLY RESTRICT THE SCOPE OF SECTION 212(c) RELIEF

Since 1956, the BIA has made Section 212(c) relief available *nunc pro tunc* to deportable LPRs who reentered after travel abroad, if the LPR was deportable for conduct that also made him excludable. *See G-A-*, 7 I. & N. Dec. at 276. The Ninth Circuit's *sua sponte* abandonment of that congressionally-accepted agency practice was error. And since 1976, deportable LPRs could seek relief provided their crime of conviction would have rendered them inadmissible had they left the country and reentered. *See Francis* v. *INS*, 532 F.2d 268 (2d Cir. 1976). The BIA's abandonment of that practice was not only error, but produced an unconstitutionally irrational distinction based on travel history.

---

[13] The Fourth and D.C. Circuits have yet to address the question presented, but those courts hear only a tiny fraction of the total number of petitions for review from the BIA. Between September 30, 2005 and September 30, 2009, the Fourth Circuit heard less than 2.8% of all BIA appeals, and the D.C. Circuit heard only one in 2009. *See 2009 Annual Report* at Table B-3.

1. The Ninth Circuit did not even acknowledge the lengthy history of agency decisions granting relief from deportation under Section 212(c) and its predecessor, the Seventh Proviso to Section 3 of the Immigration Act of 1917. *See St. Cyr*, 533 U.S. at 294; *supra* pp. 5-6. The Ninth Circuit also ignored Congress's acquiescence in that practice: Section 212(c) was enacted in 1952, long after the Attorney General's decision in *Matter of L-*, 1 I. & N. Dec. 1, 5-6 (Att'y Gen. 1940), which applied the Seventh Proviso to provide relief to a deportable LPR who had previously traveled abroad, just as it would have applied if he had been placed in exclusion proceedings at the border. Congress is presumed to have been aware of that interpretation of the discretionary waiver as applicable to deportable LPRs. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

As the BIA explained shortly after Section 212(c)'s enactment, Congress conducted a "comprehensive study" of the Seventh Proviso before enacting Section 212, "[y]et there is nothing to indicate that Congress wished to cut off this unique relief in deportation proceedings." *Matter of S-*, 6 I. & N. Dec. 392, 396 (BIA 1955). Congress thus "effectively ratified" the BIA's practice of granting discretionary relief from deportation as well as from exclusion. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000); *see also Boeing Co.* v. *United States*, 537 U.S. 437, 456-457 (2003) (Congress's failure to override a seven-year-old regulation when amending relevant statutory provisions "serves as persuasive evidence that Congress re-

garded that regulation as a correct implementation of its intent").[14]

The Ninth Circuit's complete abandonment of Section 212(c) relief in all deportation cases is manifestly contrary to Congress's intent to continue in Section 212(c) the relief from *deportation* available under the Seventh Proviso, as well as to decades of agency and judicial application of Section 212(c). Indeed, under the Ninth Circuit's view, Mr. St. Cyr himself would have been ineligible for Section 212(c) relief.

2. The Court should also reject the BIA's novel approach in *Blake* and *Brieva-Perez*, which has been adopted in the majority of circuits. Before 2005, the BIA consistently held that an LPR deportable on the basis of an aggravated felony conviction for "sexual abuse of a minor" or a "crime of violence" was eligible for Section 212(c) relief if the underlying conviction would have been a basis for inadmissibility (*e.g.*, as a "crime involving moral turpitude" under INA §212(a)(2)(A)(i)). *See supra* nn.5-6. As recently as 2003, the BIA affirmed a grant of Section 212(c) relief to an LPR convicted of voluntary manslaughter, ruling that "a conviction for first degree manslaughter is considered to be a crime involving moral turpitude" and that

---

[14] Although Congress imposed limits on Section 212(c) relief prior to its 1996 repeal, Congress never sought to limit it to excludable LPRs only. *See* Immigration Act of 1990, Pub. L. No. 101-649, §511, 104 Stat. 4978, 5052 (providing that LPRs convicted of aggravated felonies could seek Section 212(c) relief only if they did not serve a term of imprisonment of five years or more); 136 Cong. Rec. S6586, S6604 (daily ed. May 18, 1990) (statement of Sen. Dole) ("Section 212(c) provides relief from exclusion, and by court decision from deportation[.] This discretionary relief is obtained by numerous excludable and *deportable* aliens[.]" (emphasis added)).

the LPR was accordingly *not* precluded from seeking Section 212(c) relief. *Matter of Reyes Manzueta*, 2003 WL 23269892 (BIA Dec. 1, 2003).

In *Blake*, however, the BIA sought to eliminate Section 212(c) relief retroactively for most deportable LPRs by creating a new eligibility requirement: that the charged deportation provision use "similar language" to an inadmissibility provision. The BIA thus categorically foreclosed numerous previously eligible individuals from seeking Section 212(c) relief, even though relief *is* available *nunc pro tunc* to similarly situated persons who have left the country and reentered before the removal proceeding began.

The BIA's *Blake* decision creates an irrational distinction between deportable LPRs who have traveled abroad and reentered and deportable LPRs who have not, contrary to Section 212(c) as it has consistently been interpreted and contrary to equal protection. Following the Second Circuit's 1976 decision in *Francis*, the BIA and all of the courts of appeals agreed that deportable LPRs who had *not* departed and reentered were constitutionally entitled to the same treatment under Section 212(c) as LPRs who had. *Francis*, 532 F.2d at 273 (ruling that LPRs who had not traveled abroad were "in like circumstances, but for irrelevant and fortuitous factors," to LPRs who had and therefore should be "treated in a like manner"); *see supra* n.2. The BIA implemented *Francis* using the "statutory counterpart" test, which meant that Section 212(c) relief was available to LPRs who were deportable for a *conviction* that fell under a "counterpart" exclusion provision.

Section 212(c) relief was widely available to LPRs charged with being deportable on the basis of aggravated felony convictions, including convictions for

"crimes of violence," because most such convictions are also grounds for exclusion—"crimes involving moral turpitude" under INA §212(a)(2)(A)(i). The BIA and numerous circuit decisions recognized the proper application of Section 212(c) relief in such aggravated felony cases. *See supra* nn.5-6. Although Congress amended the INA after *Francis*, it has not cast doubt on that consistent interpretation of Section 212(c). *See supra* n.14; *see also Cabasug* v. *INS*, 847 F.2d 1321, 1327 (9th Cir. 1988) (Wallace, J., concurring) (explaining that it would violate equal protection "to distinguish between *aliens who had committed the same crime* on the basis of whether they traveled abroad recently" (emphasis added)).

After the repeal of Section 212(c), the BIA attempted to apply the repeal retroactively to LPRs who had pled guilty before the repeal was enacted. *E.g.*, *St. Cyr* v. *INS*, 229 F.3d 406, 409 (2d Cir. 2000) (observing that the BIA denied St. Cyr's application for Section 212(c) relief "specifically" because IIRIRA repealed that provision), *aff'd*, 533 U.S. 289 (2001). After this Court reversed that practice in *St. Cyr*, the BIA tried another tack, claiming for the first time that eligibility "turns on whether Congress has employed *similar language* to describe substantially equivalent categories of offenses." *Matter of Blake*, 23 I. & N. Dec. 722, 728 (BIA 2005) (emphasis added). While acknowledging that "there may be considerable overlap" between deportation provisions like "sexual abuse of a minor" and inadmissibility provisions like "crime[] involving moral turpitude," the BIA claimed that the "two categories of offenses [were] not statutory counterparts." *Id.*

The BIA has admitted that this was "a change in law." *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005), *appeal docketed*, No. 08-70736 (9th Cir. Feb.

22, 2008). It was also contrary to the settled interpretation of Section 212(c) acknowledged in the BIA's own decisions. The BIA never attempted to explain why differences in the wording of deportation and inadmissibility provisions—most of which were independently amended at different times—should control whether an LPR is eligible for Section 212(c) relief. *See Blake* v. *Carbone*, 489 F.3d at 102 ("Congress did not employ similar terms when writing the grounds of exclusion and grounds of deportation because it had no need to, making it an exercise in futility to search for similar language to gauge whether equal protection is being afforded."). Indeed, the BIA held decades ago that a waiver of *exclusion* based on a particular criminal conviction also waived any basis for *deportation* based on "the same criminal conviction," without regard to the language of the statutory subsections. *G-A-*, 7 I. & N. Dec. at 275; *see Abebe*, 493 F.3d at 1109 (Berzon, J., concurring).

The BIA's new approach draws an arbitrary and irrational line based on recent travel abroad. Deportable LPRs who pled guilty to a pre-1997 offense that qualifies as both a "crime of violence" aggravated felony and a "crime involving moral turpitude" may still seek Section 212(c) relief by invoking the *nunc pro tunc* procedure, provided they departed the country and reentered. But under *Brieva-Perez*, identically-situated LPRs who did *not* depart and reenter are categorically ineligible for relief. Making Section 212(c) relief turn on whether a person has or has not left the country, in the face of consistent and contrary judicial and agency decisions before 2005, is arbitrary and capricious. *See* 5 U.S.C. §706(2)(A). That is particularly the case given that Section 212(c) is designed to *favor* those LPRs who have strong ties to the United States. *See Francis*, 532

F.2d at 273; *see also Rosario* v. *INS*, 962 F.2d 220, 225 (2d Cir. 1992) (noting the government's position that Section 212(c)'s purpose is to provide relief to "aliens who have developed such strong ties to this country that exclusion or deportation would be unjustly harsh" (internal quotation marks omitted)).[15]

The BIA's new approach is also inconsistent with the guarantee of equal protection in the Due Process Clause of the Fifth Amendment, which protects LPRs as well as citizens. *Mathews* v. *Diaz*, 426 U.S. 67, 77-78 (1976); *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896). The BIA may not make discretionary waivers of deportation available only to a subcategory of similarly situated deportable LPRs on the basis of an irrational classification, such as travel history. *See City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation ... will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886) ("Though the law itself be fair on its face ... if it is applied and

---

[15] *Blake* is also arbitrary and capricious in that it gives the government an exclusive right to determine whether Section 212(c) relief will be available in many cases. A criminal conviction can often render an individual deportable under more than one provision—here, for instance, Mr. Judulang's manslaughter conviction was charged as both a "crime involving moral turpitude" (waivable under *Blake*) and a "crime of violence" (not waivable under *Blake* and *Brieva-Perez*). App. 33a-34a. The BIA's new rule places Section 212(c) eligibility entirely under the government's control; in some cases, LPRs who would have been eligible for a Section 212(c) waiver if the government had chosen to assert a criminal conviction as a CIMT are deemed ineligible because the government opts to charge it as an aggravated felony. *See Dalombo Fontes* v. *Gonzales*, 483 F.3d 115, 122 (1st Cir. 2007); *see also Kim*, 468 F.3d at 62-63.

administered by public authority ... so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

The Second Circuit's approach, by contrast, is faithful to the BIA's longstanding and accepted interpretation of Section 212(c), and it avoids the irrational distinction inherent in the BIA's new approach. As the Second Circuit held, an LPR should be eligible to apply for Section 212(c) relief "if his or her particular aggravated felony offense could form the basis of exclusion under §212(a) as a crime of moral turpitude." *Blake* v. *Carbone*, 489 F.3d at 104.

That approach, which the BIA and the courts followed for nearly thirty years under *Francis*, does not create any distinction based on departure from the United States. Rather, it simply continues the long-accepted rule that an LPR who would be entitled to seek relief *nunc pro tunc* from deportation, had he departed, remains eligible if he did not depart. *See, e.g.*, *Matter of Fuentes-Campos*, 21 I. & N. Dec. 905, 913 (BIA 1997) ("In *Francis* ... [the Second Circuit] concluded that the Board violated the constitutional requirement of equal protection when it permitted one alien in deportation proceedings to apply for a waiver but denied permission to another alien in deportation proceedings, based solely on the fact that one had departed and returned prior to the deportation proceedings while the other had not.").[16]

---

[16] The Ninth Circuit suggested that a rational distinction existed between deportable LPRs and inadmissible LPRs. *Abebe*, App. 67a-68a. But that is the wrong comparison. The correct

The Second Circuit accordingly directed the BIA to determine whether the LPR's conviction was a "crime involving moral turpitude" that would have been waivable *nunc pro tunc* had he departed the United States and reentered and, if it was, to consider the Section 212(c) application on the merits. *Blake* v. *Carbone*, 489 F.3d at 105. The BIA's failure to do likewise in Mr. Judulang's case was arbitrary and capricious, inconsistent with the settled interpretation of Section 212(c), and unconstitutional.[17]

3. The BIA's *Blake* decision was also an improper retroactive application of an erroneous interpretation of the 2004 DOJ regulation, which sought to implement *St. Cyr*, not to confine it. The regulation provides that Section 212(c) relief "shall be denied if ... [t]he alien is deportable under former section 241 of the Act or removable under [S]ection 237 of the Act on a ground which does not have a statutory counterpart in [S]ection 212 of the Act." 8 C.F.R. §1212.3(f)(5). On its face, this regulation is consistent with the BIA's prior rulings that an LPR deportable for an aggravated felony conviction was eligible for Section 212(c) relief if the *conviction* would also fall under a counterpart inadmissibility provision.

---

comparison is between two groups of *deportable* LPRs: one group that has left the country and reentered following conviction, and one that has not. *Blake* v. *Carbone*, 489 F.3d at 95; *Francis*, 532 F.2d at 273. To Petitioner's knowledge, neither the government nor the BIA has ever suggested any rational basis for treating the latter group *less* favorably than the former group.

[17] On remand from the Second Circuit, an IJ found Mr. Blake eligible for a Section 212(c) waiver and granted relief. The government did not appeal.

In *Blake*, the BIA purported to interpret the regulation differently, not based on anything in the regulation itself, but on an anonymous commenter's opinion, cited in the preamble to the final regulation, that Section 212(c) relief should be denied " 'if there is no comparable ground of inadmissibility for the specific *category* of aggravated felony charged. ... [F]or example, the rule should not apply to aggravated felons charged with deportability under specific types or categories of aggravated felonies such as *"Murder, Rape, or Sexual Abuse of a Minor"* or *"Crime of Violence"* aggravated felonies.' " 23 I. & N. Dec. at 726 (quoting 69 Fed. Reg. 57,826, 57,831 (Sept. 28, 2004)).

The commenter misinterpreted the statutory counterpart test by focusing on the category of aggravated felony charged rather than the underlying offense. The commenter did not identify a single decision forbidding an LPR with a conviction in any of the identified aggravated felony categories from seeking Section 212(c) relief. As noted above, the statutory counterpart rule affected LPRs with convictions for firearms offenses or entry without inspection. *See supra* nn.3-4; *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 282 n.4 (Att'y Gen. 1991), *aff'd without op.*, 983 F.2d 231 (5th Cir. 1993). And contrary to the commenter's assertion, Section 212(c) can be used to waive deportation for crimes such as murder and rape, although such serious offenses require a heightened showing in order to warrant a favorable exercise of discretion. *See* 6 Gordon, Mailman & Yale-Loehr, *Immigration Law & Procedure* §74.04[1][a], [2][g] (2007).[18]

---

[18] The DOJ, in the "supplementary information" accompanying the final regulation, agreed that " 'an alien who is deportable or

But even if the commenter's interpretation were correct and constitutional (and it is neither), the BIA cannot use an adjudicatory proceeding to apply a regulation retroactively, when no statutory or regulatory language envisions retroactive application. *See Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208-209 (1988) ("[A]dministrative rules will not be construed to have retroactive effect unless their language requires this result.... Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.").

III. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL AND CONTINUING IMPORTANCE TO NUMEROUS LEGAL PERMANENT RESIDENTS

The LPRs most affected by the BIA's decision in *Blake* include many who have strong claims for a discretionary waiver of removal. As this Court has observed, Section 212(c) relief is granted based on criteria including "the seriousness of the offense, evidence of either rehabilitation or recidivism, the duration of the alien's residence, the impact of deportation on the family, the number of citizens in the family, and the character of any service in the Armed Forces." *St. Cyr*, 533 U.S. at 296 n.5 (citing *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978)). Mr. Judulang's immediate family, including his daughter, two sisters, and elderly mother are U.S. citizens and live in Southern California. He

---

removable on a ground that does not have a corresponding ground of exclusion or inadmissibility is ineligible for section 212(c) relief.'" *Blake*, 23 I. & N. Dec. at 726-727 (quoting 69 Fed. Reg. at 57,831). It did not, however, take any position on the commenter's enumeration of the various offenses that the commenter believed lacked a statutory counterpart.

has continuously resided in this country since the age of eight. Since his release on bond, Mr. Judulang has continued to work to support himself and his family.

Mr. Judulang is not alone. Because deportable "aggravated felony" offenses have been defined broadly and "without regard to how long ago they were committed[,] ... the class of aliens whose continued residence in this country has depended on their eligibility for §212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for §212(c) relief have been granted." *St. Cyr*, 533 U.S. at 295-296 (noting that from 1989 to 1995, "§212(c) relief was granted to over 10,000 aliens"). Despite its repeal in 1996, Section 212(c) continues to provide critical relief to numerous LPRs who were convicted of a crime long ago, but are otherwise deserving members of their local United States communities. *See id.* at 296 n.6 (noting increased importance of Section 212(c) relief following 1996 expansion of "aggravated felony" definition to include "more minor crimes which may have been committed many years ago"). The pernicious effects of *Blake* are most obvious in cases where Section 212(c) relief was first granted, then rescinded after *Blake*. *See supra* p. 12.

Petitioner does not contend that he has a legal *right* to relief; Section 212(c) remains and has always been a discretionary provision. But he does have a right to have the agency exercise that discretion following an evidentiary hearing on the merits—a hearing that he was entitled to prior to the BIA's retroactive "change in law." *Cardona*, 2005 WL 3709244. Absent this Court's intervention, numerous deserving legal immigrants like Mr. Judulang will be unlawfully denied relief from removal based only on an accident of geography—the jurisdiction in which their immigration pro-

ceedings happen to be held. *See* App. 95a-105a (non-exhaustive list of cases affected by BIA's decision in *Blake*).

Although this issue has been presented in recent petitions for certiorari, they have proven to be unsuitable vehicles. At the time of the petition in *Gonzalez-Mesias* v. *Holder*, 129 S. Ct. 2042 (2009), the Eleventh Circuit had not yet addressed the issue and the Ninth Circuit was still considering the petition for full court rehearing in *Abebe*. The petitions in *De la Rosa* and *Abebe* would have triggered Justice Kagan's recusal under 28 U.S.C. §455(b)(3), which counseled against certiorari. *See, e.g., Microsoft Corp.* v. *United States*, 530 U.S. 1301, 1303 (2000) (statement of Rehnquist, C.J.) (in cases of recusal, "[n]ot only is the Court deprived of the participation of one of its nine Members, but the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court"). This case raises none of these issues and is accordingly a proper vehicle for resolving this pressing question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
PAUL R. Q. WOLFSON
JAMES L. QUARLES III
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

MARK C. FLEMING
Counsel of Record
MEGAN BARBERO
ELIZABETH KENT CULLEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

NOVEMBER 2010

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOEL JUDULANG, AKA JOEL ALEGRE JUDULANG,
Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Respondent.

No. 06-70986
Argued June 4, 2007
Filed Sept. 17, 2007

On Petition for Review of an Order of the
Board of Immigration Appeals, Agency No. A34-461-941

Before: HALL and CALLAHAN, Circuit Judges, and ROBART,* District Judge.

MEMORANDUM**

Joel Judulang was born on June 26, 1966 in the Philippines, but claims that he obtained derivative citizenship through his parents. The parties are familiar

* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

with the facts, and we do not repeat them except where necessary to render our decision. We deny Judulang's petition on his claim of derivative citizenship.

In removal proceedings, the DHS has the burden of proving removability by "clear, unequivocal, and convincing evidence." *Woodby v. INS*, 385 U.S. 276, 277 (1966). Judulang's birth in the Philippines creates a rebuttable presumption of alienage, and the burden shifted to Judulang to prove his citizenship. *See Scales v. INS*, 232 F.3d 1159, 1163 (9th Cir. 2000).

The DHS produced Judulang's birth certificate at his hearing, and Judulang did not dispute that he was born on June 19, 1966 in the Philippines. At the hearing, the DHS also introduced into evidence that Judulang's father naturalized on September 22, 1978, and Judulang's mother naturalized on June 21, 1985. Judulang failed to introduce any evidence that his mother naturalized before his 18th birthday, meaning he did not obtain derivative citizenship under Immigration and Naturalization Act ("INA") § 321 as it read in 1984, 8 U.S.C. § 1432(a) (1988).

The evidence Judulang offered to support his claim of derivative citizenship consists of a copy of his grandfather's military record, and a declaration of intention filed by his father in 1958. These were submitted on appeal to the BIA. Even assuming this evidence was admissible, it does not show that Judulang's father was a United States citizen prior to Judulang's birth in 1966.[1]

---

[1] Congress eliminated the declaration of intention as a prerequisite to becoming a citizen by passing the INA in 1952. 66 Stat. 163, 254-55 (1952). Declarations of intention became optional

Before this court, Judulang argues that the BIA made a legal error by concluding that, assuming Judulang's father became a citizen in 1958, he did not meet the ten-year residency requirement for transmission of U.S. citizenship to his son in 1966. Judulang contends that the Philippines was one of the "outlying possessions" of the United States, so Judulang's father satisfied the physical presence requirement under INA § 301(a)(7) by living for over ten (10) years in the Philippines. This argument fails because after 1952, INA § 101(a)(29) stated that: "The term 'outlying possessions of the United States' means American Samoa and Swains Island." 66 Stat. 170; 8 U.S.C. § 1101(a)(29) (1952). Because the Philippines were not "outlying possessions" of the United States within the meaning of the INA, the BIA did not commit legal error in concluding that Judulang's father did not meet the physical presence requirement of § 301(a)(7). *Petition for Naturalization of Garces*, 192 F.Supp. 439, 440 (N.D. Cal. 1961).

Even assuming that Judulang's father was a citizen in 1958, for Judulang to receive automatic citizenship under 8 U.S.C. § 1431(a) as it existed in 1984, his mother had to naturalize before his eighteenth birthday. As noted by the IJ, Judulang's mother did not naturalize until Judulang turned nineteen (19), so Judulang did not receive automatic derivative citizenship

---

documents used to preserve certain rights under state laws that did not confer citizenship rights. *See United States v. Menasche*, 348 U.S. 528, 535-39, 536 n.4 (1955); *Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937, 938 n.1 (9th Cir. 2004). Only completion of the naturalization process, and obtaining a certificate of naturalization confers citizenship on the alien. *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 966-72 (9th Cir. 2003).

through his parents. Therefore, on the record before the IJ, and the BIA, Judulang failed to create a genuine issue of material fact regarding his claim of citizenship.

Judulang further argues that he is eligible for a waiver of deportation under former INA § 212(c). Judulang was convicted of voluntary manslaughter in 1989. Judulang contends that he is eligible for relief from his aggravated felony crime of violence conviction under former INA § 212(c). The BIA, however, held that there was no substantially similar statutory counterpart for aggravated felony crimes of violence in the grounds for exclusion in former INA § 212(a), and therefore Judulang was ineligible for a waiver under § 212(c).

Judulang's argument is foreclosed by our decision in *Abebe v. Gonzales*, 493 F.3d 1092, 1104-05 (9th Cir. 2007). In *Abebe*, we concluded that lack of a substantially identical statutory counterpart in § 212(a) for aggravated felony sexual abuse of a minor among the grounds for exclusion rendered the alien ineligible for § 212(c) relief. *Id.* *Abebe* is controlling. The aggravated felony/crime of violence ground for deportation is not substantially similar to any ground for exclusion in the former § 212(a). *Matter of Brieva-Perez*, 23 I. & N. Dec. 766, 772-73 (B.I.A. 2005). Therefore, Judulang was not eligible for a § 212(c) waiver. *Abebe*, 493 F.3d at 1095-96; *Caroleo v. Gonzales*, 476 F.3d 158, 168 (3d Cir. 2007).

DENIED.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A34 461 941 - El Centro Date: FEB 03 2006

In Re: JOEL JUDULANG a.k.a. Joel Alegre Judulang

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro Se

ON BEHALF OF DHS: Debra Robinson
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony (as defined in section 101(a)(43)(G))

Lodged: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] – Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony (as defined in section 101(a)(43)(F))

APPLICATION: Termination of removal proceedings; waiver of deportability

ORDER:

PER CURIAM. We affirm the Immigration Judge's September 28, 2005, decision ordering the respondent removed from the United States to the Philippines. Specifically, we conclude that the record does not support the respondent's claim of United States citizenship. Furthermore, the respondent is removable from the United States as an alien convicted of an aggravated felony, *see* section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (2000), and is ineligible for a waiver of deportability under former section 212(c) of the Act, 8 U.S.C. § 1182(c) (1988).

In removal proceedings, evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden of going forward on that issue to the respondent. *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 164 (BIA 2001). The respondent does not dispute that he was born in the Philippines, and therefore he bears the burden of presenting evidence in support of his claim to United States citizenship. The Immigration Judge determined that the respondent could not have derived citizenship through the naturalization of his parents under former section 321(a)(1) of the Act, 8 U.S.C. § 1432(a)(1) (1984), because his mother did not naturalize until after his 18th birthday. The respondent does not challenge this determination on appeal, but instead asserts that his father may have become a United States citizen in 1958, approximately 8 years prior to the respondent's birth in 1966. Yet even were we to assume that the respondent's father did become a United States citizen in 1958, we fail to understand how

this fact would tend to prove that the respondent is a citizen. At the time of the respondent's birth in 1966, former section 301(a)(7) of the Act, 8 U.S.C. § 1401(a)(7) (1952), conferred United States citizenship at birth upon an individual born outside the United States of parents one of whom is an alien, and the other a citizen of the United States, if, prior to the birth of the individual, the United States citizen parent had been physically present in the United States for an aggregate period of not less than 10 years, at least 5 of which were after the United States citizen parent attained the age of 14 years. By his own admission, the present respondent was born less than 10 years after 1958—the year when his father commenced his period of physical presence in the United States. Accordingly, the respondent was not a United States citizen at birth under the law in effect in 1966.[1] Given the absence of any evidence to suggest that the respondent can satisfy the core requirements for citizenship under former sections 301(a)(7) and 321(a)(1) of the Act, we will not disturb the Immigration Judge's determination that the respondent is an "alien" within the meaning of section 101(a)(3) of the Act. As such, he is subject to the jurisdiction of the Immigration Court and this Board.

---

[1] Pursuant to section 12 of the Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655, 3657, current section 301(g) of the Act (the statutory successor to former section 301(a)(7)) now requires that the United States citizen parent have been physically present in the United States for an aggregate period of only 5 years, at least 2 of which must have been after attaining 14 years. However, this shorter period applies only to the parents of children born after November 14, 1986, the effective date of the 1986 Act. *See* section 8(r) of the Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, 102 Stat. 2609.

On September 18, 1989, the respondent was convicted in California of the offense of voluntary manslaughter in violation of CAL. PENAL CODE § 192(a), for which he was sentenced to a term of imprisonment of 6 years. The respondent does not challenge the Immigration Judge's determination that this conviction renders him removable from the United States as an alien convicted of an "aggravated felony"; to wit, a crime of violence under 18 U.S.C. § 16 for which the term of imprisonment imposed was at least 1 year. *See* section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F).[2] Instead, he argues that he is eligible for a waiver of deportability under former section 212(c) of the Act, 8 U.S.C. § 1182(c), pursuant to *INS v. St. Cyr*, 533 U.S. 289 (2001). We do not agree. The respondent's ineligibility for section 212(c) relief derives not from the retroactive application of the 1996 amendment and 1997 repeal of former section 212(c), but rather from the fact that the "crime of violence" aggravated felony category has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act. *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). Neither the Immigration Judges nor this Board have jurisdiction to grant section 212(c) relief to an alien who is deportable under section 237(a) of the Act on a ground that has no statutory counterpart in the grounds of inadmissibility under section 212(a). 8 C.F.R. § 1212.3(f)(5) (2005).

---

[2] Although the aggravated felony definition in effect at the time of the respondent's 1989 conviction did not encompass "crimes of violence" under 18 U.S.C. § 16, subsequent statutory amendments both added crimes of violence to the aggravated felony definition and made that amended definition explicitly retroactive. *See, e.g., United States v. Maria-Gonzalez*, 268 F.3d 664, 669 (9th Cir. 2001); *Aragon-Ayon v. INS*, 206 F.3d 847 (9th Cir. 2000).

In conclusion, the respondent has not adduced evidence to support his claim to United States citizenship. Furthermore, the respondent's voluntary manslaughter conviction renders him removable as an alien convicted of an aggravated felony under section 101(a)(43)(F), a ground of deportability that cannot be waived under former section 212(c) of the Act. Because the respondent's manslaughter conviction is sufficient, standing alone, to render him removable and ineligible for relief, we need not determine at this time whether his 2003 grand theft conviction would also constitute a valid factual predicate for deportability.

Accordingly, the appeal is dismissed.

/s/ Patricia A. Cole
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION COURT
El Centro, California

File A 34 461 941 September 28, 2005

Proceeding in the Matter of:

JOEL JUDULANG,)
)
Respondent)

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended—in that any time after admission you have been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act, a theft offense for which the term of imprisonment is at least one year.

ADDITIONAL CHARGES FILED UNDER LODGED CHARGE:

Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act—in that any time after admission you have been convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct;

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended by the Immigration Act of 1990—in that you were convicted of an aggravated felony as

defined in Section 101(a)(43)(F) of the Illegal Immigration and Immigrant Responsibility Act of 1996—any time after entry.

APPLICATIONS:

None submitted; no eligibility established.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DEPARTMENT OF HOMELAND SECURITY:
Pro Se	Deborah Robinson, Esquire Immigration and Customs Enforcement 1115 North Imperial Avenue El Centro, California 92243

ORAL DECISION OF THE IMMIGRATION JUDGE

The Department of Homeland Security issued the Notice to Appear June 10, 2005 setting forth the above ground of deportability as the basis for the respondent's removal.

On June 10, 2005, the Notice to Appear was served upon the respondent and it was filed with the Immigration Court on June 15, 2005. The respondent was ordered to appear before the Immigration Court the following day, June 16, 2005.

The respondent appeared before the Immigration Court on that date.

The respondent appeared before the Immigration Court which was sitting in Imperial, California by televideo conference to Calipatria State Prison in Calipatria, California. That is an institution of the Califor-

nia Department of Corrections wherein the respondent was an inmate.

The Government counsel appeared along with the Court staff at the Immigration Court in Imperial, California. Both of those locations are under the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The respondent was placed under oath to tell the truth in the proceedings.

The respondent was advised of the purpose of the proceedings and why he was in court. He was advised of each of the rights to which he is entitled in this proceeding. The allegations were read to the respondent, and the charge of deportability explained to him.

The respondent stated that he understood the purpose of the hearing, the rights that he was advised of, the allegations filed against him, and the charge of deportability.

The respondent confirmed that he had in fact received a copy of the Notice to Appear and was before the Court under his true name.

The respondent confirmed that he'd received the list of legal services working in the area and the form setting forth his appeal rights.

The respondent requested a continuance to be able to retain counsel. That request was granted.

As a matter of fact, the Court continued the matter on several occasions to give the respondent the opportunity to be able to retain counsel, as it appeared that he was working on obtaining counsel.

The respondent appeared before the Court on today's date, his case having been continued from

June 16, 2005 until today's date to give an opportunity to be able to retain counsel. He had not done so. He indicated that they had talked to an attorney and the attorney was reviewing his case at this time.

The Court required that the respondent proceed without counsel. He was advised that he could bring an attorney into his case at any point and time as long as this matter was still continued.

The respondent admitted that he's not a citizen or national of the United States.

The respondent admitted that he is a native and citizen of the Philippines. The respondent testified that his mother is a United States citizen, having become a citizen in 1985. She's married to his father who became a citizen in 1978.

The respondent admitted that he has been admitted to the United States since July 4, 1974 through Honolulu, Hawaii.

The respondent admitted that on February 18, 2003 he was convicted in the Superior Court of California, County of Los Angeles, for the offense of grand theft of property over $400 in violation of Section 487(a) of the California Penal Code.

The respondent admitted that for that offense he was sentenced to confinement for a period of two years and eight months.

The respondent stated that no appeal was filed with the Court of Appeals on that conviction.

The Government lodged a charge in this case when they filed their prehearing submission. The respondent acknowledged receipt of that and it's part of a packet of information. The respondent admitted that he had

been convicted September 18, 1989 in the Superior Court of California, County of Los Angeles West Judicial District for the offense of manslaughter. The respondent denied that for that offense he was sentenced to confinement for a period of six years suspended with 684 days of jail as a condition of probation.

The respondent submitted a packet of information dealing with the potential citizenship issue which was admitted as Exhibit 2 in its entirety.

The respondent's mother submitted some documents to the Court. Those were provided so Government counsel could review those. They were admitted into evidence as Exhibit 3.

The Government's prehearing submission was admitted as Exhibit 4.

The respondent stated that he'd had an opportunity to review the conviction records and they appeared to be accurate information.

The Court's had an opportunity to review the conviction records and the Court finds that the respondent's grand theft conviction meets the modified categorical approach being an aggravated felony as charged by the Government, a theft offense for which the term of imprisonment is at least one year.

Based upon the evidence of record, the exhibits and the admissions of the respondent, the Court likewise finds that allegation 10 is true; that the respondent has been sentenced to six years, which was suspended, and he was sentenced to 684 days in jail as a condition of probation.

Based upon a review of the conviction documents, the respondent's admissions, the Court finds that the respondent is subject to deportation on the two addi-

tional charges filed against him in the lodged charge. At this point in time, all of the allegations have been proven by evidence that's clear and convincing evidence and the respondent is subject to removal from the United States.

The court would note, if anybody is concerned about the citizenship issue, that the respondent testified that his date of birth is June 26, 1966. The respondent would have become 18 years of age on June 26, 1984. The respondent's father naturalized and became a citizen September 27, 1978. His father is married to his mother. She became a citizen on June 21, 1985. The respondent was over 18 years of age at the time.

The respondent gains no citizenship benefit through the naturalization of his parents based upon the information before the Court.

The respondent designated the Philippines as the country for removal should that become necessary and the Court accepts that designation.

The only remaining issue in the case is whether the respondent qualifies to be considered for any avenue of relief. The respondent's statutorily ineligible based upon his convictions and the sentences imposed therefore to be considered for cancellation of removal under Subsection A or B.

The respondent's statutorily ineligible to be considered for adjustment of status to lawful permanent residency even if a petition was filed to immigrate him because he no longer qualifies for the necessary 212(h) waiver to waive these crimes involving moral turpitude.

He's statutorily ineligible to be considered for asylum, withholding, and withholding under Article 3 of the Convention Against Torture.

He's statutorily ineligible to be considered for voluntary departure in either of its forms, Section 212(c) of the Immigration and Nationality Act relief, Section 249 registry, and there is no Section 209(c) issue in this case.

The respondent was queried by the Court if he had any concerns that he would be tortured if returned to the Philippines and he responded, "No".

The Court's analyzed the various issues in this case. All the allegations have been proven. The charges of deportability have been sustained by the proper standard. He is not eligible for any forms of relief for the reasons stated. The following order issues.

ORDER

The respondent is hereby ordered removed from the United States to the Republic of the Philippines.

/s/ Dennis R. James
DENNIS R. JAMES
United States Immigration Judge
September 28, 2005

IMMIGRATION COURT
2409 LA BRUCHERIE ROAD
IMPERIAL, CA 92251

In the Matter of

Case No.: A34-461-941

*S-JUDULANG, JOEL
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Sep 28, 2005. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to PHILIPPINES.
~~or in the alternative to~~

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to PHILIPPINES
or in the alternative to

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to PHILIPPINES.

Respondent's application for:

[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn

[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn

[ ] A Waiver under Section ___ was ( ) granted ( ) denied ( ) withdrawn

[ ] Cancellation under Section 240A(a) was ( ) granted ( ) denied ( ) withdrawn

Respondent's application for:

[ ] Cancellation under Section 240A(b) (1) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Cancellation under Section 240A(b) (2) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section _____ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date: Sep 28, 2005

/s/ Dennis R. James
DENNIS R. JAMES
Immigration Judge

Appeal: Waiver/Reserved Appeal Due By: Oct 28, 2005

Respondent

ALIEN NUMBER: 34-461-941 ALIEN NAME: *S-JUDULANG, JOEL

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [X] ALIEN c/o Custodial Officer
[ ] ALIEN'S ATT/REP [X] INS

DATE: 9/28/05 BY: COURT STAFF /S/

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOEL JUDULANG, AKA JOEL ALEGRE JUDULANG,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

No. 06-70986
Agency No. A034-461-941
[STAMP: FILED AUG 26 2010]

ORDER

Before: HALL and CALLAHAN, Circuit Judges, and ROBART, District Judge.*

Judge Hall, Judge Callahan, and Judge Robart vote to deny the petition for rehearing. Judge Callahan votes to deny the petition for rehearing en banc, and Judge Hall and Judge Robart so recommend. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

APPENDIX E

STATUTORY PROVISIONS

8 U.S.C. §1101(a)(43) provides in relevant part:

The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

* * *

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;

* * *

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

Section 212(a) of the Immigration and Nationality Act, codified at 8 U.S.C. §1182(a), provides in relevant part:

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following para-

graphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

Former Section 212(c) of the Immigration and Nationality Act, codified at 8 U.S.C. §1182(c) (1996), repealed April 1, 1997, provides in relevant part:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section[.] ... The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has

served for such felony or felonies a term of imprisonment of at least 5 years.

Section 237 (formerly Section 241) of the Immigration and Nationality Act, codified at 8 U.S.C. §1227, provides in relevant part:

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and re-

gardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

APPENDIX F

REGULATORY PROVISION

8 C.F.R. § 1212.3(f)(5) provides in relevant part:

An application for relief under former section 212(c) of the Act shall be denied if:

* * *

(5) The alien is deportable under former Section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.

APPENDIX G

INFORMATION RELEASABLE UNDER THE FREEDOM OF INFORMATION ACT

Name
JUDULANG, JANUARIO

Branch of Service and Serial/Service Number(s)
ARMY OF THE UNITED STATES/ PS 6 735 336

Dates of Service
JULY 1, 1946 TO MARCH 31, 1948
JUNE 8, 1945 TO JUNE 30, 1946
MAY 28, 1923 TO MAY 27, 1935

Duty Status
DISCHARGED

Rank/Grade
STAFF SERGEANT/1948
CORPORAL/1946
PRIVATE FIRST CLASS/1935

Salary
N/A

Source of Commission
NONE

Promotion Sequence Number
N/A

Assignments and Geographical Locations
SERVICE COMPANY 45TH INFANTRY REGIMENT APO 613
COMPANY D 8TH MP BATTALION
BATTERY D 2013 AAA WEAPONS BATTALION

Military Education
N/A

Decorations and Awards

AMERICAN DEFENSE SERVICE MEDAL; ASIATIC-PACIFIC THEATER MEDAL; DISTINGUISHED UNIT BADGE; PHILIPPINE LIBERATION RIBBON; PHILIPPINE DEFENSE RIBBON; PHILIPPINE-INDEPENDENCE RIBBON; WORLD WAR II VICTORY MEDAL; GOOD CONDUCT MEDAL; WORLD WAR II SERVICE LAPEL BUTTON

Transcript of Court-Martial Trial

NOT IN FILE

Photograph

N/A

Place of Entry

BASE M, LUZON, PHILIPPINES

Place of Separation

CAMP O'DONNELL, CAPAS, TARLAC, P.I.

FOR DECEASED VETERAN ONLY

Place of birth

PAOAY, ILOCOS NORTE, PHILIPPINES

Date of Death

N/A

Location of Death

N/A

Place of Burial

N/A

NOTE: N/A denotes information is not available in the

REPORT—INDETERMINATE SENTENCE,
OTHER SENTENCE CHOICE

FORM CR 2

ERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
BRANCH WEST DISTRICT

0 0 1 1

PLE OF THE STATE OF CALIFORNIA
NDANT: 01 JEDALORG, JOEL
AKA:

A972722 - A
- B
- C
- D
- E

RT TO JUDICIAL COUNCIL OF: ☐ INDETERMINATE SENTENCE
TATE PRISON ☒ SENTENCE CHOICE OTHER THAN STATE PRISON

DATE OF HEARING	DEPT. NO.	JUDGE	CLERK
11 89	WE C	ROBERT THOMAS	C. LEVERSON

COUNTY	COUNSEL FOR PEOPLE	COUNSEL FOR DEFENDANT	PROBATION NO. OF PROBATION OFFICER

DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONIES:

ADDITIONAL COUNTS ARE LISTED ON ATTACHMENT

CNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO. DAY YEAR)	CONVICTION BY (COURT, JURY, PLEA)	AS TO (ALL, SOME, ONE)	ENHANCEMENTS (CHARGED AND FOUND)
	PC	192.A	Manslaughter (a lesser included)	88	09 18 89	X		

Number of prior prison terms charged and found

SECTION	NUMBER
667.5(a)	
667.5(b)	
667.5(c)	

b. Number of prior felony convictions

SECTION	NUMBER
667.5(c)	

] Defendant was sentenced to death on count(s) _____.
] Defendant was sentenced to State Prison:
☐ For life, or a term such as 15 or 25 years to life, with possibility of parole, on count(s) _____.
☐ For life without the possibility of parole on count(s) _____.
☐ For other term prescribed by law on count(s) _____.
] Count(s) _____ were deemed misdemeanors.
☐ Defendant sentenced to _____ days in county jail for all counts.
number

☐ Defendant fined in sum of $ _____.
] For count(s) 1, the defendant was placed on probation.
(1) ☐ Sentence pronounced and execution of sentence was suspended; or
(2) ☒ Imposition of sentence was suspended.
Conditions of probation included: ☒ Jail Time 684 days ☐ Fine
for disposition

☐ Defendant was committed to California Youth Authority.
☐ Proceedings suspended, and defendant was committed to California Rehabilitation Center.
☐ Proceedings suspended, and defendant was committed as a Mentally Disordered Sex Offender.
☐ Proceedings suspended, and defendant was committed as mentally incompetent.
☐ Other (Specify) _____

PURSUANT TO ARTICLE VI, SECTION 8 OF THE CALIFORNIA CONSTITUTION AND SECTION 68086 OF THE GOVERNMENT CODE, THE CHIEF JUSTICE REQUIRES THAT EACH SUPERIOR COURT SHALL COMPLETE THIS FORM FOR EACH INDETERMINATE SENTENCE TO STATE PRISON OR SENTENCE CHOICE OTHER THAN STATE PRISON. THE REPORTS IMPLEMENT SECTION 1170.4 OF THE PENAL CODE AND SHALL BE MAILED TO: ADMINISTRATIVE OFFICE OF THE COURTS, 350 McALLISTER, 3300 STATE BUILDING, SAN FRANCISCO, CALIFORNIA 94102

DATE: OCT 16, 1989

SIGNATURE OF CLERK: [signature]

REPORT—INDETERMINATE SENTENCE,
OTHER SENTENCE CHOICE
FORM CR 391 (10/1/81)

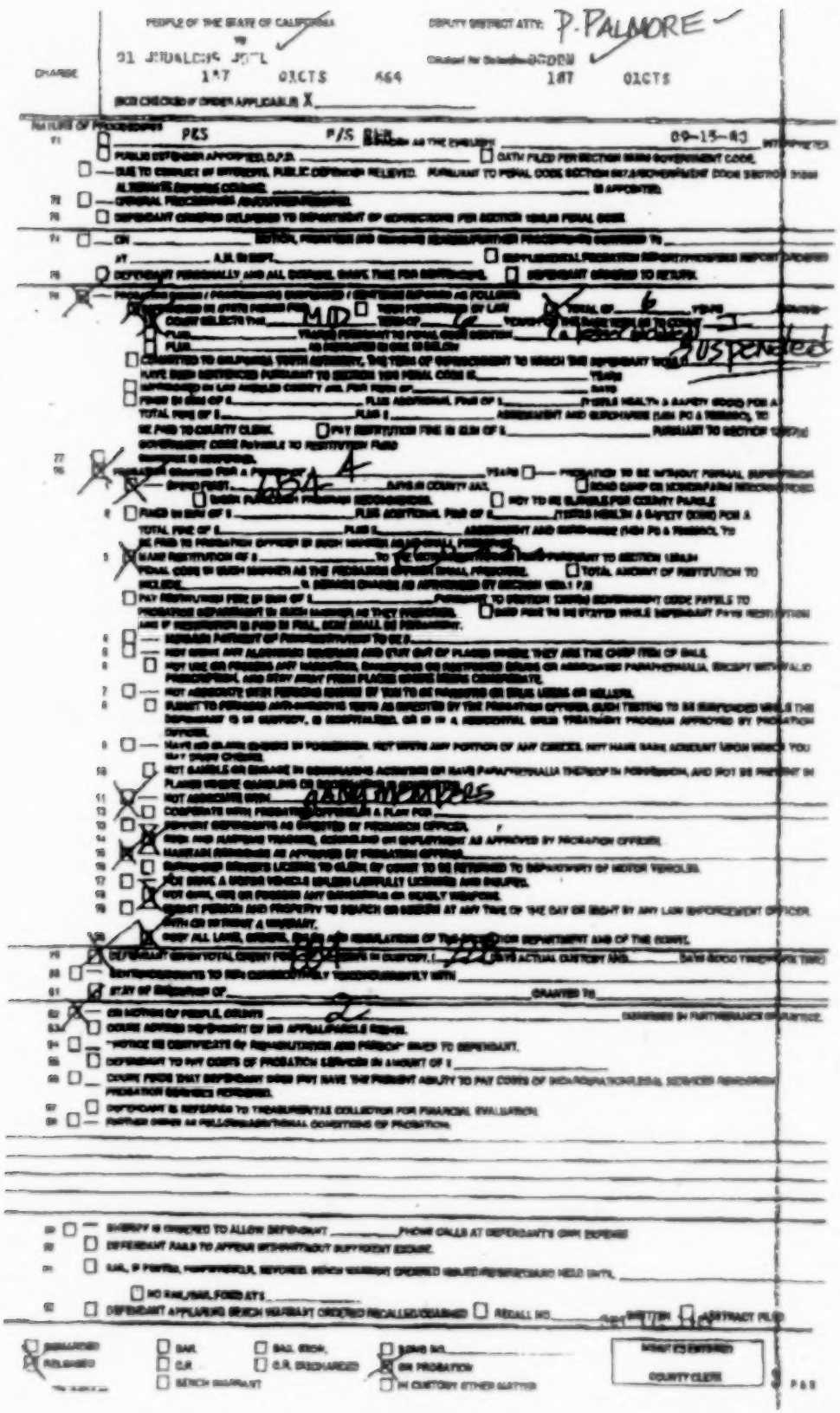
Const., Art. VI, § 6
Pen. C. 1170.4, 1170.9

COPY TO
ADMINISTRATIVE OFFICE OF THE COURTS

APPENDIX H

31a

000033



000034

Best copy available

APPENDIX I

U.S. Department of Justice
Immigration and Naturalization Service

Additional Charges of Inadmissibility/Deportability

In: X Removal proceedings under section 240 of the Immigration and Nationality Act

Z Deportation proceedings commenced prior to April 1, 1997 under former section 242 of the Immigration and Nationality Act

In the Matter of:

Alien/Respondent: **JUDULANG, Joel**

File No: **A34 461 941**
Address: **1115 N. Imperial Ave., El Centro, CA 92243**

There is/are hereby lodged against you the additional charge(s) that you are subject to being taken into custody and deported or removed from the United States pursuant to the following provision(s) of law:

Additional charge:

Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, in that, at any time after admission, you have been convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct.

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, by the Immigration Act of 1990, in that you were convicted of an aggravated felony as defined in § 101(a)(43)(F) of the Illegal Immigration and

Immigrant Responsibility Act of 1996 (IIRIRA) anytime after entry.

In Support of the additional charge(s) there is submitted the following factual allegation(s) X in addition to Z in lieu of those set forth in the original charging document:

Additional allegations:

09. You were, on September 18, 1989, convicted in the Superior Court of California, County of Los Angeles, West Judicial District, for the offense of Manslaughter.

10. For that offense, you were sentenced to confinement for a period of six years suspended 684 days in Jail as a condition of probation.

Date: 8/16/05 /s/ [illegible]
(signature of Service Counsel)

Form I-261(Rev 4/1/97)N

APPENDIX J

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

Matter of JOEL JUDULANG,
Respondent

File A 34 461 941

IN REMOVAL PROCEEDINGS
Transcript of Hearing

Before DENNIS R. JAMES, Immigration Judge

Date: September 28, 2005

Place: El Centro, California

Transcribed by DEPOSITION SERVICES, INC. at Rockville, Maryland

Official Interpreter:

Language:

For the Department of Homeland Security:	For the Respondent:
Deborah Robinson, Esquire	Pro Se

JUDGE FOR THE RECORD

This is Immigration Judge Dennis R. James. I'm on the record today, September 28, 2005. The Court is

sitting in El Centro, California calling the matter of Joel Judulang, A 34 461 941. He is present in court today without counsel. The Government is represented by their attorney Deborah Robinson.

* * *

Q. Are you a citizen or national of the United States?

A. No.

Q. Pardon?

A. No.

Q. Are you a native and citizen of the Philippines?

A. Yes.

Q. Can't hear you.

A. Yes.

Q. Can't hear you.

A. Yes.

Q. Either one of your parents a United States citizen?

A. Yes.

Q. Which one?

A. My mother and my father.

Q. Okay. And when did your mother become a citizen?

A. 1985.

Q. And when did your father become a citizen?

A. I think 1978.

JUDGE TO MS. ROBINSON

Q. And Ms. Robinson, do you have any confirmation information on that?

A. We have his father, 9/1/1978; his mother, 6/21/1985.

Q. Okay.

JUDGE TO MR. JUDULANG

Q. What's your date of birth, sir?

A. 6/26/66

Q. 6/26 —

A. '66

Q. '66. Okay, so you would have been over the age of 18 when your parents became United States citizens, correct? Your father? I mean when your mother did?

A. Yes.

Q. Your parents married?

A. Yes.

Q. So at the time that your mother became a citizen you were over the age of 18, correct?

A. (Indiscernible.)

Q. So you gain no citizenship benefit as a result thereof. Have you been a lawful permanent resident since July 4, 1974 through Honolulu, Hawaii?

A. Yes.

* * *

Q. Sir, here's the situation in your case. With your convictions and the time that you've been sentenced to, you do not qualify for cancellation of removal

in either of its forms. You do not qualify for adjustment of status to try to reimmigrate to the United States because these are crimes involving moral turpitude. And because you've been convicted of an aggravated felony after your admission you're no longer eligible for a 212(h) waiver to try and waive these convictions to reimmigrate to the United States, so [sic] are bars at this time. You're not eligible for asylum or withholding or withholding under the Torture Convention because of the convictions and the sentences imposed. You have no viable claim to be asserted for protection called deferral under Article 3 of the Convention Against Torture. You're not eligible to be considered for voluntary departure in either of its forms.

Likewise, you are not eligible for Section 212(c) relief. That's a form of relief that could have been applied to your manslaughter conviction but the problem is you were sentenced to six years there. That could be a litigatable problem; but more importantly, even if the 212(c) was granted on that conviction you can't use it to get to the most recent conviction that you've suffered which is the grand theft of property over $400. So Section 212(c) has been repealed, doesn't apply to the grand theft conviction. You're not eligible for cancellation because of the grand theft conviction. So Section 212(c) does not apply in your case either.

* * *

APPENDIX K

SUPREME COURT OF THE UNITED STATES

No. 10A247

JOEL JUDULANG,

Applicant

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ORDER

UPON CONSIDERATION of the application of counsel for the applicant, and the response filed thereto,

IT IS ORDERED that the judgment of the United States Court of Appeals for the Ninth Circuit, case No. 06-70986, is hereby stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme Court of the United States

Dated this 16th
day of September, 2010.

APPENDIX L

U.S. Department of Justice

Decision of Board of Immigration Appeals

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A37 749 964—New York Date: [STAMP: May 9 2003]

In re: DOUGLAS ANTHONY ROWE

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Eileen Collins Bretz, Esquire

ON BEHALF OF SERVICE: George J. Ward, Jr.
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)]
Convicted of aggravated felony

APPLICATION: Waiver of inadmissibility

The parties have filed cross appeals from the Immigration Judge's decision to consider and deny the merits of the respondent's request for a waiver of inadmissibility pursuant to section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). Both appeals will be dismissed.

The respondent asserts that the Immigration Judge erroneously denied his request for a waiver based on the unfounded conclusion that his equities do

not outweigh the adverse factors. The Immigration and Naturalization Service ("Service," now the Department of Homeland Security, DHS) asserts that the Immigration Judge erred in concluding that the respondent was eligible to apply for a section 212(c) waiver. The Service asserts that there is no comparable ground of inadmissibility available to an alien convicted of an aggravated felony, and that the respondent is therefore precluded from applying for a section 212(c) waiver. We will first address the Service's argument.

The Board has found that an alien convicted of an aggravated felony may be eligible for a waiver under section 212(c) where the conviction could also form the basis for an exclusion ground. *See Matter of Meza*, 20 I&N Dec. 257, 259 (BIA 1991). The Board rejected the principle that a 212(c) waiver is unavailable to an alien convicted of an aggravated felony simply because no ground of exclusion expressly recites the words "convicted of an aggravated felony." *See id.* In *Matter of Meza*, the alien had been convicted of a drug trafficking crime, an aggravated felony, and would have been inadmissible under section 212(a)(23) as result of the conviction. The Board found that, in light of the corresponding 212(a)(23) ground of inadmissibility, the respondent was not precluded from establishing eligibility for section 212(c) relief.

In this case, the respondent was convicted of second degree robbery, which presently could be considered an aggravated felony as either a crime of violence or a theft crime. *See* sections 101(a)(43)(F) and (G) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1101(a)(43)(F) and (G). In addition, the respondent's conviction could have formed the basis for an inadmissibility charge pursuant to section 212(a)(2)(A)(i)(I) of

the Act, as amended, as an alien convicted of a crime involving moral turpitude. Thus, based on the precedent set forth in *Matter of Meza, supra*, the respondent is not precluded from establishing eligibility for section 212(c) relief. We are not persuaded by the Service's appellate argument, which rests largely on the law stemming from cases where the alien was charged with a firearms offense. *See Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995); *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992); *see also Cato v. INS*, 84 F.3d 597 (2d Cir. 1996).

Turning to the respondent's claim that he should have been granted a waiver pursuant to section 212(c), we find that the Immigration Judge considered the relevant equities and adverse factors of record. The Immigration Judge applied the well-established standards for exercising discretion. *See Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *see also Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991); *Matter of Edwards*, 201 I&N Dec. 191 (BIA 1990). Following a full and detailed analysis, the Immigration Judge reasonably concluded that the equities do not outweigh the adverse factors (I.J. at 13-28). The Immigration Judge noted that the respondent has very significant equities, including a long period of residence in the United Stales and extensive family ties. However, the Immigration Judge concluded that the nature of the respondent's offense (robbery in the second degree) under circumstances involving a firearm and a car chase through New York City, and combined with unclear evidence of rehabilitation, outweighed the positive factors. We find insufficient basis for concluding otherwise.

Therefore, we will affirm the Immigration Judge's discretionary denial. Accordingly, we will enter the following orders.

ORDER: The appeal, filed by the Service, is dismissed.

FURTHER ORDER: The respondent's appeal is dismissed.

/s/ [illegible]
FOR THE BOARD

APPENDIX M

Matter of JUAN REYNALD DAVILA MUNOZ
a.k.a. Juan Reynaldo Davila

File: A35 279 774 – Houston

Board of Immigration Appeals

28 Immig. Rptr. B1-1

AUG 07 2003

HOLDING

The BIA sustained respondent's appeal in part and dismissed it in part, finding that respondent did not obtain citizenship at birth but that he was eligible to apply for a waiver of inadmissibility under former § 212(c) of the INA. With regard to respondent's citizenship claim, the BIA found insufficient evidence to support the finding that respondent's father had lived in the U.S. for 5 years after he turned 16 but prior to the time of respondent's birth, elements necessary to prove citizenship by birth. With regard to respondent's eligibility for a waiver of inadmissibility, the BIA found that respondent fell squarely within the class of persons covered by *INS* v. *St. Cyr*, 533 U.S. 289 (2001) who are entitled to seek a waiver under former § 212(c) of the INA in removal proceedings. The BIA also found that the absence of a specific aggravated felony ground in § 212(a) of the INA did not preclude respondent from obtaining a § 212(c) waiver since there is a corresponding ground of inadmissibility to the crime of aggravated assault on a peace officer in § 212(a)(2)(A)(i)(I) of the INA, conviction of a crime involving moral turpitude. Although the BIA previously rejected this "corre-

sponding ground" analysis, it found it appropriate in this case, given the fact that Congress had allowed those aggravated felons who served less than 5 years in prison to be eligible for relief through former § 212(c) relief. Based on these findings, the BIA remanded the record to allow respondent to apply for a waiver of inadmissibility.

SUMMARY OF ISSUES

CITIZENSHIP: The BIA found that respondent did not automatically acquire citizenship at birth through his father since he was unable to present enough evidence to show that his father had lived in the U.S. for 5 years after he turned 16 but prior to the time of respondent's birth, elements necessary to prove citizenship by birth.

WAIVER OF INADMISSIBILITY: The BIA found that respondent, an aggravated felon who was convicted of aggravated assault on a peace officer, was eligible for a waiver of inadmissibility under former § 212(c) of the INA as a result of the Supreme Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001) and the fact that a corresponding ground of inadmissibility was present in § 212(a)(2)(A)(i)(I) of the INA.

FACTS

Respondent, a native and citizen of Mexico, entered the U.S. in 1976 as a lawful permanent resident. In 1991, he was convicted of aggravated assault on a peace officer. In 1998, DHS (formerly INS) initiated removal proceedings against him. Respondent denied the allegations against him, contending that he acquired U.S. citizenship at birth through his father. The IJ continued the case several times to allow DHS to consider respondent's Application for Certificate of Citizenship.

DHS denied the application, finding that respondent failed to present enough evidence to show that his father met the 10 year residency requirement. The IJ also found that respondent had not submitted enough evidence to establish that he acquired U.S. citizenship at birth. Last, the IJ found that respondent was ineligible for a waiver of inadmissibility under former § 212(c) of the INA because there was no corresponding ground of exclusion in § 212(a) for the aggravated felony ground with which he was charged. Respondent appealed.

CROSS-REFERENCES

Immigration Law and Procedure chaps. 1, 2, 74, 91, 98.

COUNSEL: COUNSEL: ON BEHALF OF RESPONDENT: Kaye Ellis Stone, Esquire

ON BEHALF OF DHS: Merilee Fong, Assistant District Counsel

Before: Patricia A. Cole, Board Member

OPINION BY: Cole, Board Member.

OPINION: On March 20, 2003, an Immigration Judge found that the respondent had failed to present sufficient evidence to show that he was a United States citizen and determined that the respondent was ineligible to apply for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The respondent has appealed from this decision. The appeal will be sustained in part and dismissed in part, and the record will be remanded to the Immigration Judge for further proceedings consistent with this order.

I. BACKGROUND

The respondent was born in Mexico on October 28, 1952 and was admitted to the United States as a lawful permanent resident on March 2, 1976. On July 1, 1991, he was convicted of aggravated assault on a peace officer. He was sentenced to 2 years in prison for this crime. In addition, on December 15, 1998, the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) initiated removal proceedings against him by filing a Notice to Appear with the immigration court. The respondent denied all of the allegations against him, including the allegation that he was not a citizen of the United States. The respondent claimed that his father was born in the United States and that his father had resided here for at least 10 years before the respondent's birth. The respondent therefore argued that he acquired United States citizenship automatically at birth through his father. *See* section 201 (g), Nationality Act of 1940, 8 U.S.C. § 1151(g)(1940).[1]

The Immigration Judge continued the respondent's case to allow him to file an Application for Certificate of Citizenship (N-600) with the DHS. The DHS, however, denied the application on April 3, 2000. The DHS found that the respondent had failed to present sufficient evi-

---

[1] Because the respondent was born before December 24, 1952, he is subject to section 201(g) of the Nationality Act of 1940 rather than section 301 (g) of the Immigration and Nationality Act, 8 U.S.C. § 1401(g), the more recent provision. Section 201(g) states that an alien's parent must have resided in the United States for 10 years before the alien's birth, 5 of which were after the alien's parent turned 16 before the alien can become a citizen at birth. *See* section 201(g) of the Nationality Act.

dence to show that his father met the 10 year residency requirement. *See* Exhibit 5. Nevertheless, the DHS granted the respondent's brother's Application for Certificate of Citizenship on April 25, 2003. *See* Exhibit 7A (documents obtained from DHS through Freedom of Information Act request). The respondent therefore attempted to have the DHS reconsider his application. Both the Immigration Judge and the DHS attorney at the respondent's hearing agreed that reconsideration was appropriate, and the Immigration Judge continued the respondent's case several times to allow the DHS to conduct its review (Tr. at 11-14, 17-18, 21-23).

After assessing the evidence the respondent's brother had submitted in support of his application, the DHS found no basis for reversing its original ruling in the respondent's case. *See* Exhibit 9 (Memorandum from Debra K. Lewis to File). The Immigration Judge also found that the respondent had not submitted enough evidence to establish that he acquired United States citizenship at birth (I.J. at 2-4). In addition, the Immigration Judge found that the respondent was ineligible for a waiver of inadmissibility under former section 212(c) of the Act because there was no corresponding ground of exclusion in section 212(a) of the Act for the aggravated felony ground in section 237(a) of the Act under which he was charged (I.J. at 4-5). The respondent has appealed from each of these findings.

II. CITIZENSHIP

In the case of an alien like the respondent who has been admitted to the United States, the burden is on the DHS to establish removability. *See* section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A). This burden includes establishing alienage, and the DHS

met that burden in the respondent's case by establishing his foreign birth. *See* Exhibit 4A (respondent's birth certificate); *Matter of Leyva*, 16 I&N Dec. 118, 119 (BIA 1977) (finding that evidence of foreign birth gives rise to a rebuttable presumption of alienage and shifts the burden to the respondent to produce some evidence of citizenship); *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327 (BIA 1969). The respondent therefore must present some evidence of citizenship to overcome the DHS's proof of alienage. *See Matter of Leyva, supra*; *Matter of Tijerina-Villarreal, supra.*

The respondent claims on appeal that his evidence is sufficient to show that his father met the residence requirements of section 201(g) of the Nationality Act of 1940, but we disagree. Like the Immigration Judge, we find insufficient evidence in the record to show that the respondent's father resided in the United States for 5 years after he reached age 16 and before the respondent was born on October 28, 1952. The respondent's father testified during the respondent's brother's immigration proceeding and indicated that he left the United States in 1932 and then returned to this country to work in 1949 or 1950. *See* Exhibit 13, Transcript of Respondent's Brother's Proceedings, at 30, 32-33. In an affidavit, the respondent's father stated that he came to the United States for a few months each year between 1945 and 1951 to do seasonal agricultural work and then returned to this country almost full-time starting in 1951 or 1952. *See* Exhibit 7A, at 20-22. Under either of these scenarios, we cannot conclude that the respondent's father was in the United States for 5 years between 1943, the year he turned 16 years old, and October 28, 1952, the date the respondent was born. And the other evidence of record does not alter this conclu-

sion. *See, e.g.*, Exhibits 6, 7, 10B, 13; *see also Matter of Tijerina-Villarreal, supra*, at 330-31.

Moreover, the fact that the respondent's brother was able to obtain a certificate of citizenship does not necessarily establish that the respondent is eligible. The respondent's brother was born in 1960 and therefore is subject to slightly different requirements. *See* section 301(g) of the Act, 8 U.S.C. § 1401(g). In addition, he only had to show that his father was in this country for 5 years between 1941 and his birth in 1960. He therefore had an additional 8 years within which to establish his father's presence. In this case, it appears that the extra 8 years was critical to his case.

In light of the above, we find that the Immigration Judge was correct to conclude that the respondent's evidence is not sufficient to rebut the presumption of alienage in his case. We therefore affirm the Immigration Judge's ruling on this issue and find that the respondent is subject to removal.

III. SECTION 212(c) WAIVER

On the other hand, we find that the Immigration Judge erred in pretermitting the respondent's application for a waiver of inadmissibility under former section 212(c) of the Act. First, the respondent falls squarely within the class of persons covered by the United States Supreme Court's ruling in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). The respondent is a lawful permanent resident with well over 7 years' lawful domicile in this country and he pled guilty to his offense before Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of

Pub. L. No. 104-208, 110 Stat 3009-546 ("IIRIRA"). He therefore is entitled to seek a waiver under former section 212(c) of the Act in removal proceedings.

And the absence of a specific aggravated felony ground in section 212(a) of the Act does not prevent the respondent from obtaining a section 212(c) waiver. Generally, a waiver under former section 212(c) of the Act was only available to waive grounds of deportability that had corresponding grounds of inadmissibility in section 212(a) of the Act. *See Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (A.G. 1991). Nevertheless, we have found that an alien convicted of an aggravated felony may be eligible for a waiver under section 212(c) of the Act when the conviction could also lead to inadmissibility under section 212(a) of the Act *See Matter of Meza*, 20 I&N Dec. 257, 259 (BIA 1991). In *Meza, supra*, we rejected the principle that a section 212(c) waiver is unavailable to an alien convicted of an aggravated felony simply because no ground of exclusion expressly recites the words "convicted of an aggravated felony." *Id.* The alien in *Meza, supra*, had been convicted of a drug trafficking crime, an aggravated felony, and would have been inadmissible under then-section 212(a)(23) of the Act as result of the conviction. We found that, in light of the corresponding section 212(a)(23) ground of inadmissibility, the respondent was not precluded from establishing eligibility for section 212(c) relief.

In this case, the respondent was convicted of aggravated assault on a peace officer, an offense that currently qualifies as a crime of violence under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F) and an aggravated felony. This offense also could make the respondent inadmissible under section 212(a)(2)(A)(i)(I) of the Act as an alien convicted of a crime involving

moral turpitude. Thus, there is a "corresponding" ground of inadmissibility for the respondent's offense, and, under the reasoning in *Matter of Meza, supra*, the respondent is not precluded from establishing eligibility for section 212(c) relief.

The Immigration Judge dismissed this type of "corresponding ground" analysis based on our ruling in *Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984). In that case, we held that an alien who was deportable under then-section 241(a)(5) of the Act as an alien convicted under 18 U.S.C. § 1546 could not apply for a section 212(c) waiver because there was no corresponding ground of inadmissibility under section 212(a) of the Act. The respondent in that case argued that his offense was also a crime involving moral turpitude and therefore could make him inadmissible under one of the provisions in section 212(a), but we declined to follow this analysis. We found that not all offenses covered by section 241(a)(5) were crimes involving moral turpitude and that we therefore could not extend section 212(c) to cover this ground of deportability. *See Matter of Wadud, supra*, at 184-5.

The present case, however, is distinguishable from *Matter of Wadud, supra*, in a very significant way. The ground of removability in this case is the aggravated felony ground, section 237(a)(2)(A)(iii) of the Act rather than former section 241(a)(5) of the Act. And the language of former section 212(c) of the Act specifically acknowledged that some aliens convicted of aggravated felonies would be eligible to apply for relief. The last sentence of former section 212(c) read: "[t]he first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years." *See* section 212(c) of

the Act. By eliminating this category of aliens from the class of persons eligible for section 212(c) relief, this provision also indicated that aliens who did not meet this requirement, namely aliens who were convicted of aggravated felonies but served less than 5 years in prison were allowed to apply for a section 212(c) waiver. These aliens, however, would only have been able to seek section 212(c) waivers if the rationale of *Matter of Meza, supra* was applied to their cases. Because it is doubtful that Congress would have added a provision addressing a category of individuals who were already ineligible for relief, it is only logical to conclude that aliens charged under the aggravated felony ground of deportability are eligible for section 212(c) waivers if their crimes fall under one of the grounds contained in section 212(a) of the Act. Because other grounds of deportability without corresponding grounds of inadmissibility were not specifically mentioned in section 212(c), this rationale does not apply to situations like the one presented in *Matter of Wadud, supra* or to cases involving aliens charged with deportability on the basis of firearms convictions. *See, e.g., Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995); *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992); *see also Cato* v. *INS*, 84 F.3d 597 (2d Cir. 1996). Accordingly, we do not find that our rulings in those cases are binding in this context.

Moreover, we note that the Supreme Court in *INS* v. *St. Cyr, supra*, accepted as a given that aliens convicted of aggravated felonies were able to apply for section 212(c) waivers. *See INS* v. *St. Cyr, supra*, at 295-298 (finding that section 212(c) waivers have great practical importance in deportation proceedings because the class of aliens who are deportable for crimes, particularly for aggravated felonies, is quite broad).

And many aliens, like the respondent, who were made eligible for section 212(c) waivers by *INS* v. *St. Cyr, supra*, were not even removable as aggravated felons until Congress expanded the definition of "aggravated felony" in the IIRIRA. The inclusion of these aliens in the class of individuals allowed to apply for section 212(c) relief therefore appears to be required under the reasoning of *INS* v. *St. Cyr, supra*, notwithstanding our ruling in *Matter of Meza, supra*.

The number of aliens affected by this ruling, however, is comparably small. Section 240A(a) of the Act, which has replaced former section 212(c) of the Act, makes any alien who has been convicted of an aggravated felony ineligible for cancellation of removal. *See* section 240A(a)(3) of the Act, 8 U.S.C. § 1229b(a)(3). Thus, aliens in removal proceedings who do not meet the requirements of *INS* v. *St. Cyr, supra*, which will be most aliens, will be ineligible for relief if they have been convicted of an aggravated felony or felonies. And aliens who do qualify for section 212(c) under *INS* v. *St. Cyr, supra*, must still establish that they merit this form of relief in the exercise of discretion.

Based upon the foregoing, we find that the respondent is entitled to apply for a waiver of inadmissibility under former section 212(c) of the Act. We therefore remand the record to the Immigration Judge to allow him to pursue this form of relief.

ORDER: The appeal is sustained in part and dismissed in part, and the record is remanded for further proceedings consistent with this order.

APPENDIX N

U.S. Department of Justice

Decision of the Board of Immigration Appeals

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A38-139-424-NEW YORK

Date: [STAMP: MAY 27 2004]

In re: *S-LEI, GUANG SHEN**

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bretz, Kerry W., Esquire

ON BEHALF OF DHS: Paul Halligan

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). The Department of Homeland Security ("DHS"), formerly the Immigration and Naturalization Service, has appealed the Immigration Judge's decision to grant the respondent's application for a waiver of inadmissibility under section 212(c) of the immigration and Nationality Act.

The DHS notes that there is no comparable ground of inadmissibility available to one convicted of an aggravated felony, and that the respondent is therefore precluded form [sic] applying for that relief. We held in *Matter of Meza*, 20 I&N Dec. 257 (BIA 1991), that a waiver under section 212(c) is not unavailable to an alien convicted of an aggravated felony simply because there is no ground of exclusion which recites the words, "convicted of an aggravated felony." *Id.* at 259. The Board concluded in that case that, because the respondent was found to have been convicted of an aggravated felony based on a conviction for a drug trafficking crime, and because the respondent would have been inadmissible under section 212(a)(23) based on that crime, he was not precluded from establishing eligibility for section 212(c) relief.

In this case, the respondent was convicted of second degree attempted robbery, which presently could be considered an aggravated felony as either a crime of violence or a theft crime. *See* section 101(a)(43)(F) and (G) of the Act (Act), 8 U.S.C. § 1101(a)(43)(F) and (G). However, at the time of the respondent's conviction on September 11, 1995, he could have been charged with inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, as amended, as one convicted of a crime involving moral turpitude. Accordingly, he would not be not precluded from establishing eligibility for section 212(c) relief. We further find no error in the Immigration Judge's decision to grant the waiver to the respondent in the exercise of discretion. Accordingly, the appeal is dismissed.

/s/ Anthony C. Moscato
FOR THE BOARD

APPENDIX O

U.S. Department Of Justice

Decision of the Board of Immigration Appeals

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A90 640 428-Seattle Date: [STAMP: MAY 25 2005]

In re: MANUEL ALEJANDRO RANGEL-ZUAZO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Manuel F. Rios, III, Esquire

ON BEHALF OF DHS: Patricia A. Duggan
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony as defined in section 101(a)(43)(A), I&N Act [8 U.S.C. § 1101(a)(43)(A)]

APPLICATION: Section 212(c) waiver

The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) appeals the Immigration Judge's January 29, 2004, decision granting the respondent a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996). The respondent has filed an opposition. The appeal will be sustained, and the record will be remanded.

The respondent is a native and citizen of Mexico. His status was adjusted to that of a lawful permanent resident in 1990. On January 8, 1993, the respondent was convicted in a Washington State court upon a plea of guilty to one count of first-degree rape of a child in violation of Wash. Rev. Code § 9A.44.073 (1986).

The DHS challenges the Immigration Judge's exercise of discretion to grant the respondent a section 212(c) waiver. We, however, will dispose of the appeal on other grounds because intervening precedent renders the respondent statutorily ineligible for section 212(c) relief. 8 C.F.R. § 1003.1(e)(5).

To be statutorily eligible for a section 212(c) waiver, the respondent must establish, *inter alia*, that section 212(a) of the Act, 8 U.S.C. § 1182(a), contains a ground of inadmissibility that is comparable to the grounds upon which he is removable, namely for having been convicted of an aggravated felony as defined in section 101(a)(43)(A) of the Act. *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; A.G. 1991), *aff'd*, 983 F.2d 231 (5th Cir. 1993); *Matter of Meza*, 20 I&N Dec. 257 (BIA 1991); *see also* 8 C.F.R. § 1212.3(f)(5). In *Matter of Blake*, *supra*, the Board recently held that the aggravated felony ground of removal based on a conviction for sexual abuse of a minor has no statutory counterpart in section 212(a) of the Act. The same is true for the respondent's removability based on his conviction for first-degree rape of a child. In *Matter of Blake*, *supra*, the Board held that the test for determining whether a ground of removability has a statutory counterpart in section 212(a) of the Act "turns on whether Congress has employed similar language to describe substantially equivalent categories of offenses." 23 I&N Dec. at 728. No provision in section

212(a) of the Act establishes inadmissibility for a rape that as a matter of law is sexual abuse of a minor. The fact that a conviction for rape of a child may often render an alien inadmissible under some provision of section 212(a) of the Act is not sufficient to meet the test for comparability. *Id.* at 729. Thus, section 212(a) of the Act does not contain a ground of inadmissibility that is comparable to the grounds upon which the respondent is removable. Accordingly, the respondent is not eligible for section 212(c) relief. We, thus, will sustain the DHS's appeal and will remand the record to the Immigration Judge for issuance of an order of removal pursuant to *Molina-Camacho* v. *Ashcroft*, 393 F.3d 937 (9th Cir. 2004).

ORDER: The DHS's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion.

/s/ [illegible]
FOR THE BOARD

APPENDIX P

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YEWHALASHET ABEBE,
Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,
Respondent.

No. 05-76201
Argued and Submitted March 25, 2008
Filed Jan. 5, 2009

On Petition for Review of an Order of the Board of Immigration Appeals, Agency No. A26-810-941

Before ALEX KOZINSKI, Chief Judge, HARRY PREGERSON, ANDREW J. KLEINFELD, SIDNEY R. THOMAS, BARRY G. SILVERMAN, RONALD M. GOULD, RICHARD C. TALLMAN, RICHARD R. CLIFTON, CONSUELO M. CALLAHAN, CARLOS T. BEA and N. RANDY SMITH, Circuit Judges.

Per Curiam Opinion; Concurrence by Judge CLIFTON; Dissent by Judge THOMAS.

ORDER

The per curiam opinion that was filed November 20, 2008, was filed in error. The opinion accompanying this order is substituted as the opinion of the court.

The previously filed concurrence and dissent are unaffected by this order.

The petition for rehearing remains pending. Within 14 days, respondent shall file a response to the petition. Petitioner may reply within 14 days of the response; the reply shall not exceed the length permitted for the response. *See* 9th Cir. R. 40-1.

OPINION

PER CURIAM:

1. Petitioner became a lawful permanent resident in 1984 and, in 1992, pled guilty to lewd and lascivious conduct upon a child. Cal.Penal Code § 288(a). INS commenced removal proceedings on the ground that he was deportable as having committed an "aggravated felony," 8 U.S.C. § 1227(a)(2)(A)(iii)—"sexual abuse of a minor," *id.* § 1101(a)(43)(A). The Immigration Judge (IJ) denied petitioner's asylum, withholding of removal and Convention Against Torture claims, and found petitioner ineligible for a discretionary waiver of deportation under former Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (repealed 1996).[1] On appeal to the Board of Immigration Appeals (BIA), petitioner argued that he's eligible for section 212(c) relief. The BIA affirmed, and Abebe petitions for review.

2. Petitioner argues that, by finding him ineligible for section 212(c) relief, the BIA denied him equal pro-

---

[1] Even though section 212(c) was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, the Supreme Court held that this repeal can't be applied retroactively to aliens, such as petitioner, who pled guilty to deportable crimes before IIRIRA took effect. *INS v. St. Cyr*, 533 U.S. 289, 326, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

tection. Relying on *Komarenko v. INS*, 35 F.3d 432, 434-35 (9th Cir. 1994), the three-judge panel held that petitioner isn't eligible for section 212(c) relief. *Abebe v. Gonzales*, 493 F.3d 1092, 1104-05 (9th Cir. 2007), *vacated*, 514 F.3d 909 (9th Cir. 2008). Under *Komarenko*, 35 F.3d at 434-35, a deportable alien can be eligible for section 212(c) relief only if his grounds for deportation are substantially identical to a ground for inadmissibility.[2] Here, petitioner is deportable for committing an "aggravated felony," 8 U.S.C. § 1227(a)(2)(A)(iii), which the panel held isn't substantially identical to the most analogous ground for inadmissibility—committing a "crime involving moral turpitude," *id.* § 1182(a)(2)(A)(i)(I). *Abebe*, 493 F.3d at 1104-05. Petitioner claims that the rationale of *Komarenko* can't be squared with that of *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981). He therefore asks us to overrule *Komarenko*, and hold that a deportable alien can only be eligible for section 212(c) relief if his *conviction* is substantially identical to a ground for inadmissibility. *See Abebe*, 493 F.3d at 1106 (Berzon, J., concurring).

Under its plain language, section 212(c) gives the Attorney General discretion to grant lawful permanent residents relief only from *inadmissibility*[3]—not depor-

---

[2] Inadmissibility (or "exclusion" under pre-IIRIRA law) applies to an alien outside the United States who is not allowed to enter, 8 U.S.C. § 1182(a), whereas deportation applies to an alien who is already in the United States and is ejected, *id.* § 1227. *See Guzman-Andrade v. Gonzales*, 407 F.3d 1073, 1076 (9th Cir. 2005). Under IIRIRA, both inadmissible and deportable aliens go through the same process, called "removal proceedings." *Id.* (citing *Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003)).

[3] IIRIRA changes somewhat the nomenclature applicable to immigration cases. What used to be "excludability" is now "inad-

tation. *See* 8 U.S.C. § 1182(c) (repealed 1996). *Tapia-Acuna*, though, followed *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976), and held that equal protection required us to extend section 212(c) relief to aliens facing deportation—if such aliens would have been eligible for section 212(c) relief from inadmissibility, had they left the United States and attempted to reenter. *Tapia-Acuna*, 640 F.2d at 225. In following *Francis*, *Tapia-Acuna* reasoned that there is no rational basis for granting additional immigration relief to aliens who temporarily leave the United States and try to reenter (i.e., aliens facing inadmissibility), and not to aliens who remain in the United States (i.e., aliens facing deportation). *Tapia-Acuna*, 640 F.2d at 225. According to *Francis* and *Tapia-Acuna*, it is wholly irrational for Congress to give *any* advantage to aliens outside the United States that it denies to similarly situated aliens within the United States.

We are not convinced that *Francis* and *Tapia-Acuna* accorded sufficient deference to this complex legislative scheme, and therefore reconsider this question, as we are authorized to do en banc. We note at the outset that the statute doesn't discriminate against a discrete and insular minority or trench on any fundamental rights, and therefore we apply a standard of bare rationality. *United States v. Barajas-Guillen*, 632 F.2d 749, 752 (9th Cir. 1980) (quoting *Alvarez v. Dist. Dir. of the U.S. INS*, 539 F.2d 1220, 1224 (9th Cir. 1976)). Congress has particularly broad and sweeping powers when it comes to immigration, and is therefore entitled to an additional measure of deference when it

---

missibility"; what used to be "deportation" is now "removal." We use these terms interchangeably.

legislates as to admission, exclusion, removal, naturalization or other matters pertaining to aliens. *See Kleindienst v. Mandel*, 408 U.S. 753, 769-70, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972); *Boutilier v. INS*, 387 U.S. 118, 123-24, 87 S.Ct. 1563, 18 L.Ed.2d 661 (1967); *Flemming v. Nestor*, 363 U.S. 603, 616, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960). Our task, therefore, is to determine, not whether the statutory scheme makes sense to us, but whether we can conceive of a rational reason Congress may have had in adopting it.[4]

We can: Congress could have limited section 212(c) relief to aliens seeking to enter the country from abroad in order to "create[ ] an incentive for deportable aliens to leave the country." *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 309 (5th Cir. 1999) (quoting *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)); *see De-Sousa v. Reno*, 190 F.3d 175, 185 (3d Cir. 1999). A deportable alien who wishes to obtain section 212(c) relief will know that he can't obtain such relief so long as he remains in the United States; if he departs the United States, however, he could become eligible for such relief. By encouraging such self-deportation, the government could save resources it would otherwise

---

[4] In making this determination, we do not look to the actual rationale for the legislation, as it is often very difficult or impossible to determine what a collective body, such as Congress, has in mind. The task would be particularly difficult in a case like ours where the statutory scheme now in force is the product of repeated layers of congressional enactments and judicial interpretations, so it is quite likely that no one anticipated the existing Byzantine structure. Our inquiry therefore focuses on whether a hypothetically rational Congress could have adopted the statutory scheme, not on whether Congress actually adopted the statute with that particular reason in mind.

devote to arresting and deporting these aliens. *See Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1153 (10th Cir. 1999), *abrogated in part by INS v. St. Cyr*, 533 U.S. 289, 326, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). Saving scarce resources that would otherwise be paid for by taxpayers is certainly a legitimate congressional objective.

Our dissenting colleagues argue that the reason we attribute to Congress is not so rational after all because aliens who are "excludable yet potentially eligible for a section 212(c) waiver ... [are] generally allowed to enter and to apply for waiver from within the country," and so the government will wind up having to deport those aliens anyway, if they are denied 212(c) relief. Dissent at 1215. But the fact that the government may choose, as a matter of grace, to admit aliens who seem very likely to be granted 212(c) relief does not mean that it won't exclude those it believes are less likely to obtain such relief. The rationality of the statute lies in giving that discretion, on a case by case basis, to an agency that can assess the likelihood of the alien's success and the cost of his removal.[5]

The dissent makes a similar error when it argues that it is inconsistent with the statutory scheme to assume "that a rational Congress would want these persons to leave the country." Dissent at 1216. The supposed irrationality here, as we understand it, would be in having people leave the country only to be readmitted after they are granted relief.

---

[5] The dissent also claims that this will somehow "increase the number of removal proceedings, which would, in turn, spend *more* government resources," dissent at 1216, but it doesn't explain how or why this would be the case.

The dissent overlooks the fact that not all those who apply for relief ultimately receive it; many, perhaps most, will not. And as to those, it makes perfect sense to want them to be outside our borders when they get the bad news. At that point, they cannot rely on inertia to remain in the country despite the adverse decision, and force the government to chase them down and pay for their deportation. As Judge Posner noted in *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), "[t]o induce their voluntary departure, a little carrot is dangled before them, consisting of the opportunity to seek a waiver should they seek to return to the country and by doing so trigger exclusion proceedings." To what extent this will actually save the government resources is something we won't know until we try it, but it is hardly irrational to presume that a significant number of aliens may decide to depart in order to get a shot at 212(c) relief. Congress certainly is entitled to experiment, without interference from the judiciary.[6] For much the same reason, the dissent is

---

[6] The dissent's citation to *Stanton v. Stanton*, 421 U.S. 7, 14, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975), dissent at 1215 is misplaced. This case involved sex discrimination, and distinctions based on sex have been subjected to far more searching scrutiny for the last 4 decades or so. *See also Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). Here we are not dealing with sex discrimination, or discrimination based on any other suspect category. And we're dealing with an area where federal power is at its zenith; indeed, the Supreme Court has instructed us that we must exercise "special judicial deference to congressional policy choices in the immigration context." *Fiallo v. Bell*, 430 U.S. 787, 793, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) (footnote omitted). It would thus be a rare case, indeed, where we could find irrationality in a congressional decision to distinguish among classes of aliens (other than along suspect lines).

mistaken in arguing that we've undermined the validity of 8 C.F.R. § 1212.3(f)(5) under the rationale of *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). Dissent at 1216. The INS may certainly choose to treat different classes of aliens the same, even though the statute does not, and nothing in *St. Cyr* prevents it from doing so. Of course, our ruling might cause the government to reconsider the regulation, and eventually repeal it as no longer necessary. But that's up to the government; nothing we say today casts any doubt on the regulation.

We thus overrule *Tapia-Acuna*'s holding that there's no rational basis for providing section 212(c) relief from inadmissibility, but not deportation. The BIA therefore didn't violate petitioner's right to equal protection by finding him ineligible for section 212(c) relief from deportation. Since petitioner was not eligible for section 212(c) relief in the first place, the BIA could not have committed an equal protection violation by denying him such relief. We affirm the BIA's section 212(c) ruling, and have no reason to reconsider *Komarenko*. Indeed, under our ruling today, *Komarenko* becomes a dead letter, as its only purpose was to fill a gap created by *Tapia-Acuna*.

3. Petitioner also argues that the IJ erred by denying his claim for withholding of removal. But petitioner didn't raise a withholding of removal claim in his brief before the BIA, and the BIA was therefore not required to consider it. *See, e.g., Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 535 n. 11 (3d Cir. 2007) (issues raised in the notice of appeal but not argued in appellant's principal brief are deemed abandoned). When a petitioner files no brief and relies entirely on the notice of appeal to make an immigration argument, as he may do before the BIA, *see* 8 C.F.R.

§ 1003.38(f), then the notice of appeal serves in lieu of a brief, and he will be deemed to have exhausted all issues raised therein. But when a petitioner does file a brief, the BIA is entitled to look to the brief for an explication of the issues that petitioner is presenting to have reviewed. Petitioner will therefore be deemed to have exhausted only those issues he raised and argued in his brief before the BIA. Here, petitioner did file a brief, which did not raise the withholding of removal issue. He therefore didn't exhaust that claim, and we lack jurisdiction to review it. *Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. 2004) (citing 8 U.S.C. § 1252(d)(1)). To the extent *Ladha v. INS*, 215 F.3d 889, 903 (9th Cir. 2000), is to the contrary, it is overruled.

PETITION DENIED IN PART and DISMISSED IN PART.[7]

---

[7] For the reasons given in the three-judge panel opinion, the BIA didn't erroneously or inconsistently apply 8 U.S.C. § 1182(c) (repealed 1996), or 8 C.F.R. § 1213(f). *Abebe*, 493 F.3d at 1101-04. Likewise, we reject petitioner's due process retroactivity argument. *Id.* at 1105.

CLIFTON, Circuit Judge, with whom Circuit Judges SILVERMAN and GOULD join, concurring in the judgment:

I concur in the judgment, denying in part and dismissing in part Yewhalashet Abebe's petition for review. I do not join most of the majority opinion,[1] however, because I believe it is both unnecessary and unwise to overrule our prior decision in *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981), to reach that result. The government has not advocated such a drastic step. The original decision by a three-judge panel of our court, *Abebe v. Gonzales*, 493 F.3d 1092 (9th Cir. 2007), reached the same result in this case as the majority reaches today, simply by applying our existing precedent, *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994). The en banc panel should do the same.

I share the concern expressed in the dissent with overruling more than sixty years of agency precedent and more than twenty-seven years of our own precedent. I also share the fear that the path taken by the majority puts into jeopardy the agency's ability to continue to grant discretionary relief in removal proceedings pursuant to 8 C.F.R. § 1212.3. Although the majority says otherwise, its interpretation of the statute appears to leave no room for that practice to continue. In addition, I would prefer to avoid aggravating a circuit split with the numerous other courts that have adopted the same balance we struck in *Komarenko*.

---

[1] I do join in Part 3 of the majority opinion, because I agree that petitioner did not exhaust his withholding of removal claim before the agency.

I nevertheless concur in the judgment because I conclude that aliens who could have been, but were not, charged with removal on grounds equivalent to a ground for inadmissibility are not similarly situated to aliens who were actually so charged. Abebe's equal protection challenge therefore fails. Put another way, although I agree with most of Part I of the dissent, I disagree with Part II and do not believe we should overturn our decision in *Komarenko* and follow the Second Circuit's recent decision in *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007). I would adhere to *Komarenko* and deny Abebe's petition accordingly.

I.

As the dissent points out, since at least 1940 the Executive Branch (now in the form of the Department of Homeland Security, or DHS, and formerly through the Immigration and Naturalization Service, or INS) has interpreted the Immigration and Nationality Act (INA) as granting it the discretion to afford relief from both deportation (of an alien inside the United States, a process now called removal) and exclusion (of an alien seeking admission to this country at the border, now described as inadmissibility). *See Matter of L.*, 1 I. & N. Dec. 1 (BIA 1940). Congress was aware of this practice when it drafted the 1952 amendments to the INA, including section 212(c). *See In the Matter of S.*, 6 I. & N. Dec. 392, 394-96 (BIA 1955) (examining the legislative history). Although the amendments made it harder for aliens to qualify for such discretionary relief, there is nothing in the legislative history, which catalogued other perceived abuses, to suggest that Congress disapproved of the government's use of the predecessor to section 212(c) to grant waivers in deportation proceedings. This is among the reasons that the Board of Im-

migration Appeals held, shortly after the amendments' passage, that the Attorney General retained the discretion under section 212(c) to grant relief in both deportation and exclusion proceedings. *Id.*

Initially, the government permitted aliens to apply for relief from deportation only if they had temporarily left the country such that they might have been subject to exclusion. In 1981, we held in *Tapia-Acuna* that there was no rational basis in the context of section 212(c) for discriminating against aliens who had remained in the United States. *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981).

Today, the majority holds that we were mistaken in *Tapia-Acuna* and that there is a legitimate basis for so limiting the availability of section 212(c) relief. Even assuming there are arguments in favor of that position, we rejected it twenty-seven years ago. There is no compelling reason to overturn that judgment now. No relevant circumstances have changed, and our decision has been on the books for nearly three decades without causing any mischief in the law. The majority may be animated by a desire to avoid future problems or more expansive conceptions of equal protection, such as that expressed by the Second Circuit in *Blake*, but that appears to me to be an empty fear. We haven't extended *Tapia-Acuna*'s rationale to other situations, and any putative harm in the future could more easily be avoided by continuing to limit that precedent to its context.

The majority doesn't quarrel with the legal rule of *Tapia-Acuna*, that the Equal Protection Clause prohibits irrational disparities in treatment. It simply disagrees with the application of that long-settled rule to a statutory provision that was repealed a dozen years

ago. It disagrees that the disparate treatment our court previously concluded was irrational is, in fact, irrational. Reasonable minds may always disagree over the outcome of a close case, however, and our prior conclusion is consistent with the conclusions of every other circuit. I see no justification for saying now that all of those decisions were incorrect, especially when the vitality of section 212(c), a statute long since repealed, has already diminished to near insignificance. There is no pressing need to pay so little heed to the weight of precedent and correct what, at most, is simply a misapplication of an agreed upon rule.

The "rational basis" the majority identifies in support of discriminating against aliens who failed to temporarily leave the United States after committing an offense that might qualify them for removal or inadmissibility relies on a tenuous chain of inferences. The majority hypothesizes that Congress anticipated that some aliens might decide to travel across the border based on knowledge that, under the immigration statute, they could be eligible for discretionary relief if they left the country and returned, but would not be so eligible if they did not leave the country. The majority further speculates that, from the group of aliens who left the country for this reason, some might be successfully stopped at the border upon their return and denied reentry, thereby saving the government the expense of having to later remove them. Perhaps. But it is not an accident that the majority opinion finds it necessary to acknowledge, at 217, n.4, that it is not seeking to identify the actual rationale for the legislation. I doubt that anyone believes that the majority's tortured construct was in the mind of anybody on Capitol Hill. Justifications for overruling one of our court's long-standing precedents should be made of sterner stuff.

We might just as well say that Congress simply preferred to let the agency grant discretionary relief only to those aliens who love international travel. We must place some rational bounds on what survives rational basis review if the constitutional right of equal protection is to have any meaning whatsoever outside the context of suspect classifications.[2]

Not only does the majority overrule our precedent, it casts doubt on DHS's power to grant section 212(c) relief in deportation or removal proceedings. It concludes that "[u]nder its plain language, section 212(c) only gives the Attorney General discretion to grant lawful permanent residents relief from *inadmissibility*—not deportation." Majority Op. at 1205 (emphasis in original). In doing so, the majority holds that sixty-eight years of agency practice was contrary to the will of Congress and in violation of the plain language of the statute the agency is charged with interpreting, and that countless otherwise deportable or removable aliens have remained in this country due to the agency's error.

Later, when addressing the dissent, the majority says otherwise and contends that nothing in the opinion undermines the validity of 8 C.F.R. § 1212.3(f)(5). That regulation codifies DHS's approach, which we approved of in *Komarenko*, of limiting the availability of section

---

[2] Perhaps the majority believes that equal protection should have force only in cases involving some form of invidious discrimination, and that all laws should survive rational basis review, but this case is a particularly poor vehicle to stake out that position given the growing irrelevance of section 212(c) and the need to break away from all of our sister circuits and reverse our own precedent to do so.

212(c) relief in removal proceedings to aliens charged with removal on a ground that has a substantially identical statutory counterpart in the INA's inadmissibility provisions (the "statutory counterpart rule"). 8 C.F.R. § 1212.3(f)(5); *Komarenko v. INS*, 35 F.3d 432, 434 (9th Cir. 1994). But if the statute itself does not authorize DHS to grant section 212(c) relief in any removal proceedings whatsoever, as the majority holds, where does authority to grant similar relief from inadmissibility come from?

It is not an answer to say that the government may choose to treat different classes or aliens the same. The statute in question is one that authorizes INS (now DHS) to grant *discretionary* waivers to persons in exclusion proceedings. If the agency had the authority to grant discretionary waivers to everyone, including persons in deportation proceedings, whether or not the statute provides such authority, then there would be no reason for the statute in the first place. The whole thrust of the majority's reasoning is that Congress, in adopting the relevant statute, could rationally distinguish between deportation and exclusion proceedings and could limit the ability of INS to grant discretionary waivers only to those in exclusion proceedings. Under the reasoning of the majority, the agency does not have the authority to grant such waivers to aliens in deportation proceedings, and if that's the case, 8 C.F.R. § 1212.3(f)(5) serves no purpose.

Finally, not only has every circuit to consider the question accepted *Tapia-Acuna*'s conclusion that section 212(c) relief is available in deportation and removal proceedings regardless of whether an alien has left the country, but every circuit to consider the question except the Second Circuit, *see Blake*, 489 F.3d at 104, has also followed *Komarenko* and upheld the constitutional-

ity of DHS's statutory counterpart rule. *See Kim v. Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); *Caroleo v. Gonzales*, 476 F.3d 158, 162-63 (3rd Cir. 2007); *f v. Gonzales*, 482 F.3d 356, 362 (5th Cir. 2007); *Gjonaj v. INS*, 47 F.3d 824, 827 (6th Cir. 1995) ("Numerous courts have held there must be a comparable ground of exclusion for an alien in deportation proceedings to be eligible for [section] 212(c) relief. We decline to change this well-established rule."); *Valere v. Gonzales*, 473 F.3d 757, 762 (7th Cir. 2007) (holding that if "the removable alien's crime of conviction is not substantially equivalent to a ground of inadmissibility ... then the removable alien is not similarly situated for purposes of claiming an equal protection right to apply for § 212(c) relief"); *Soriano v. Gonzales*, 489 F.3d 909 (8th Cir. 2006); *Rodriguez-Padron v. INS*, 13 F.3d 1455, 1459 (11th Cir. 1994); *see also Zamora-Mallari v. Mukasey*, 514 F.3d 679, 691-92 (7th Cir. 2008) (rejecting the reasoning of the Second Circuit's decision in *Blake*); *Vue v. Gonzales*, 496 F.3d 858, 860-62 (8th Cir. 2007) (same). In overruling *Tapia-Acuna* and discarding *Komarenko* as a dead letter, the majority creates a three-way circuit split between those circuits that follow *Komarenko*, those that follow *Tapia-Acuna* but not *Komarenko*, and our court. Because I can discern no good reason to abandon our sister circuits after they have faithfully accompanied us down this now well-worn path, I cannot join the majority opinion.

II.

Turning to the merits of Abebe's equal protection challenge, the dissent states that "[i]n cases such as this, it is the act or offense itself that makes one alien similarly situated to another, not the grounds the gov-

ernment chooses to use to deport the aliens." Dissent at 1217. I disagree.

The government sought to remove Abebe on two independent grounds: (1) his two convictions for committing crimes involving moral turpitude (CIMTs) and (2) his conviction for committing an aggravated felony. Abebe argues that his aggravated felony conviction could also qualify as a CIMT and that, if the government had sought to remove him solely for CIMTs, which can also render an alien eligible for exclusion, then he would have been eligible for discretionary relief under section 212(c). He contends that DHS's statutory counterpart rule violates his right to equal protection under the Due Process Clause because it denies him the benefit of section 212(c) relief simply because the government chose to remove him as an aggravated felon instead of an alien who had committed CIMTs. Abebe asks that the court impose a rule under which an immigration judge would be forced to determine whether, given a particular conviction, the government *could* have sought to remove an alien on a ground equivalent to a ground for inadmissibility.

Abebe cannot demonstrate that he has been irrationally subjected to discriminatory treatment, however, because he cannot show that he was in the same position as an alien who was charged with removal on a substantially similar ground to a ground for inadmissibility. Put simply, two aliens who have been charged with removal on different statutory grounds are not similarly situated. That the underlying facts are such that the government could have charged them with removal under similar statutory grounds is not enough. If that rule were adopted, it would create a host of problems in countless situations, predictable and unpredictable, where the government is vested with, and

exercises, discretion. To take the most obvious example, imagine the quotidian circumstance of a prosecutor faced with the decision of what charges to bring against an individual based on a given set of facts. Each charge will carry different consequences, but a defendant cannot contest the charges actually brought against him by arguing that the government could have charged him with a different offense under a different statutory provision.

Congress has vested the executive branch with discretion in whether, when, and how to charge an alien with removal. How it exercises that discretion will have a serious impact on the life of a removable alien, whether it means forcible removal from the country or the availability of section 212(c) relief. To hold that the exercise of that discretion is unconstitutional where it is not exercised in the most advantageous way possible for a given alien under the circumstances would open the door to a torrent of claims. An alien is no more entitled to section 212(c) relief when charged with a ground of removal that has no statutory counterpart under the INA's inadmissibility provisions than a defendant is entitled to a sentencing range consistent with the least serious crime with which he could have been charged.

This is not to say that the executive branch's exercise of discretion is without constitutional limits. We have permitted claims to proceed against prosecutors whose decisions were allegedly made on the basis of sex, race, or religion. *United States v. Redondo-Lemos*, 955 F.2d 1296, 1300 (9th Cir. 1992), *overruled on other grounds by United States v. Armstrong*, 48 F.3d 1508 (9th Cir. 1995) (en banc), *rev'd*, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). Absent evidence of discrimination against a suspect class, however, there is

no judicial remedy for even arbitrary charging or plea bargaining decisions, even though "such an arbitrary exercise of power would be a Due Process violation." *Morris v. U.S. Dist. Court*, 363 F.3d 891, 896 (9th Cir. 2004) (citing *Redondo-Lemos*, 955 F.2d at 1300). This is because judicial inquiry "into prosecutors' decision-making processes would entangle [courts] 'in the core decisions of another branch of government,' " raising separation-of-powers concerns. *Id.*

In *Komarenko*, this court provided additional, pragmatic reasons for denying section 212(c) relief to an alien charged with deportation under a subsection of the former deportation statute that was not "substantially identical" to a subsection of the former exclusion statute. Like Abebe, the petitioner in *Komarenko* argued that his underlying conviction could have qualified as a CIMT, a statutory ground for exclusion, which would have made him eligible for section 212(c) relief. The court held that the two grounds were "entirely dissimilar" and that "the distinction between the two classes is not arbitrary or unreasonable." 35 F.3d at 435 (citing *Campos v. INS*, 961 F.2d 309, 316 (1st Cir. 1992) ("We cannot say that it is absurd that for purposes of discretionary deportation review Congress chooses to treat different crimes differently.")). We declined to engage in speculation over whether a particular alien "*could have been* excluded under the moral turpitude provision," and noted that adopting the petitioner's proposed approach "would extend discretionary review to every ground for deportation that could constitute the essential elements of a crime involving moral turpitude." *Id.* (emphasis in original) (internal quotation marks omitted). The court concluded that "[s]uch judicial legislating would vastly overstep our limited scope of judicial inquiry into immigration legis-

lation, and would interfere with the broad enforcement powers Congress has delegated to the Attorney General." *Id.* (internal citations and quotation marks omitted). This reasoning applies with equal force today and, as discussed above, six of the seven other circuits to face the question have reached the same result.

This is not a situation, as the dissent contends, where two lawful permanent residents are being treated differently because one chose to "step across the border for a day." Dissent at 1213. It is a situation where two individuals are being treated differently because the charges against them are materially different, and different charges bring different consequences. This simple fact is as true in immigration proceedings as it is in criminal law. We cannot look only to the underlying conduct; rather, the consequences that ultimately flow from an individual's actions depend heavily on the government's exercise of its charging discretion.

Here, *Abebe* had a number of prior convictions. The government could have chosen to seek removal based on (1) his convictions for CIMTs, (2) his aggravated felony conviction, or (3) both. It chose option three, aggressively seeking removal on every available ground. The court should not put immigration judges in the business of second-guessing such charging decisions. In light of how the government chose to charge Abebe with removal, he was not similarly situated to an alien charged with being inadmissible, or an alien charged with removal on a ground with a statutory counterpart in the INA's inadmissibility provisions, and his equal protection challenge fails.

I therefore concur in the judgment of the court.

THOMAS, Circuit Judge, with whom PREGERSON, Circuit Judge, joins, dissenting:

Distilled to its essence, this case involves the irrationality of affording privileges to lawful permanent residents who step across the border for a day, but denying the same privileges to those who do not. The majority not only blesses this unequal treatment, but goes much further, overruling more than 60 years of precedent, approving an unconstitutional statutory scheme not even the Board of Immigration Appeals endorses, and implicitly declaring unconstitutional a federal regulation.

I respectfully dissent.

I

First, some background. Prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act in 1996 ("IIRIRA"), there were separate procedures and substantive rules relating to (1) the deportation of persons already present in the United States, and (2) the exclusion of persons seeking entry. *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1122 (9th Cir. 2002). The INA defined deportable aliens in § 241, 8 U.S.C. § 1251 (transferred to § 237, 8 U.S.C. § 1227), and excludable aliens in § 212(a), 8 U.S.C. § 1182. The exclusion procedures did not only apply to those seeking entry into the United States in the first instance. If a non-citizen residing in the United States temporarily left the country, he could be excluded from re-entry. Lawful permanent residents ("LPRs") are, of course, noncitizens who have successfully satisfied statutory requirements and earned the favorable exercise of discretion by the government to be allowed to reside in the United States permanently. Although a permanent

resident, an LPR still could be deported if he committed a qualifying crime. If he left the country temporarily, he could also be excluded upon return if he had committed a qualifying offense. An LPR, as a noncitizen seeking entry, would generally be subject to the same proceedings and grounds of exclusion if he traveled abroad and returned to the United States. *See* INA §§ 101(a)(3) & (13), 66 Stat. 166, 167 (1952). Facing a large volume of cases in which a waiver of exclusion was sought in compassionate cases involving LPRs, Congress afforded certain qualifying LPRs the protection of subsection (c):

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraph (1) through (25) and paragraphs (30) and (31) of subsection (a).

INA § 212(c), 66 Stat. 187.

By its terms, former INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996), applies only to persons in exclusion proceedings. The Board of Immigration Appeals ("BIA") first recognized a problem with making section 212(c) relief available to excludables but not deportables in 1940, in the context of section 212(c)'s precursor statute.[1] *See Matter of L*, 1 I. & N. Dec. 1 (1940).

---

[1] Section 212(c) grew out of the Seventh Proviso to Section 3 of the Immigration Act of 1917, 39 Stat. 874. *See Francis v. INS*, 532 F.2d 268 (2d Cir. 1976).

In *Matter of L*, the BIA held that relief under section 212(c)'s precursor was available in a deportation proceeding where the alien had departed and returned to the United States after the ground for exclusion/deportation arose. To hold otherwise, the BIA noted, would render the statute "capricious and whimsical." *Id.* at 5. The Second Circuit took this interpretation to its logical extension in *Francis*, 532 F.2d 268, holding that section 212(c) relief must be available to all persons in deportation proceedings who would be excludable on the same grounds, not just those who had actually left the country and reentered. Immediately following *Francis*, the BIA embraced the *Francis* analysis. *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976).

When the question then reached our Court, the matter had been so clearly determined that when we initially affirmed, in an unpublished disposition, a denial of section 212(c) relief to an alien in a deportation proceeding, the Supreme Court granted certiorari and remanded the case to us for reconsideration in light of the Solicitor General's position in its brief before the Supreme Court. The Solicitor General's Brief on Petition for a Writ of Certiorari asserted "the government's current position that those precedents [which limit section 212(c) to exclusion proceedings] are erroneous and should be overruled." Brief for the Respondent at 6, *Tapia-Acuna v. INS*, 449 U.S. 945, 101 S.Ct. 344, 66 L.Ed.2d 209 (1980). The Solicitor General further stated that "[i]n the government's view, the Ninth Circuit's position is without support in either the statutory language of [section 212(c)] or the case law on which the court of appeals has relied." *Id.* at 6. On remand, we followed *Francis* and held that "eligibility for [§ 212(c)] relief cannot constitutionally be denied to an otherwise

eligible alien who is deportable under [§ 241(a)(11) (narcotics conviction)], whether or not the alien has departed from and returned to the United States after the conviction." *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981).

To this date, every court to consider the issue has determined that due process requires that section 212(c) must be applied to deportation proceedings as well as exclusion proceedings. *See Blake v. Carbone*, 489 F.3d 88, 103-04 (2d Cir. 2007) (discussing cases).

A

Our sister circuits are right. The Supreme Court has long held that the constitutional promise of equal protection of the laws applies to aliens as well as citizens. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Under the minimal scrutiny test, which is applicable in this case, distinctions between different classes of persons "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Stanton v. Stanton*, 421 U.S. 7, 14, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975). As the Second Circuit recognized in *Francis*, "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time." 532 F.2d at 273.

Throughout this litigation, the government has been unable to provide a rational basis for this unequal treatment. The majority attempts to conjure one, urging that the rational basis for making section 212(c) re-

lief available only to aliens in exclusion proceedings is to encourage "self-deportation" and thus save government resources. There is no record support for this rationale, and the majority's reasoning contains two fundamental flaws. First, there is no support for the contention that encouraging "self-deportation," as described by the majority, would actually further the interest of saving government resources. Second, the rational reason the majority prescribes to Congress presumes an interest which is actually in conflict with the statute itself. While the majority correctly notes that we do not have to look to the actual rationale for the legislation, in order to be rational, the reason must be consistent.

When an LPR leaves and attempts to reenter the country and is deemed excludable yet potentially eligible for a section 212(c) waiver, the LPR is generally allowed to enter and to apply for the waiver from within the country. If the alien is ultimately denied the waiver, the government must remove him. No fewer government resources are exerted than if the alien applied for a § 212(c) waiver during a deportation proceeding. Moreover, if the statute were to actually function as the majority presumes and encourage aliens to voluntarily place themselves in this position—a contention which I find dubious—this would increase the number of removal proceedings, which would, in turn, spend *more* government resources.[2] There is no sup-

---

[2] The majority responds that the government may "exclude those it believes are less likely to obtain relief." If we are going to assume that LPRs will be fully informed, in advance, about the differing availabilities of relief in deportation and exclusion proceedings and will make rational, calculated decisions about voluntarily leaving the country in order to initiate an exclusion proceed-

port in the record for the assertion that treating returning LPRs differently from those who remain would save government resources.

Second, implicit in the majority's argument that a rational Congress would want to encourage aliens who are excludable but eligible for section 212(c) waiver to place themselves in exclusion proceedings is the assumption that a rational Congress would want these persons to leave the country. This is inconsistent with the fact that, by creating section 212(c) waiver, Congress explicitly identified this group of aliens as desirable for reentry to the country, subject to the Attorney General's discretion. This is not a group of aliens who, if they are identified, will necessarily be removed from the country. Rather, this is a group of aliens whom Congress has deemed worthy to remain in the country, in spite of having been convicted of particular crimes.[3] This is the group that is being sorted based on whether or not they have recently departed and reentered the country. There is simply no logical reason to discriminate between persons whom Congress has deemed worthy—subject to the discretion of the Attorney General—of remaining in the country based on whether or

---

ing, we should also assume these individuals will take into account the likelihood of obtaining relief. Those unlikely to obtain relief are equally unlikely to take the risk of leaving the country. The majority's speculation does nothing to undermine the point that there is no support for the notion that encouraging "self-deportation" will save government resources.

[3] At the risk of stating the obvious, making section 212(c) relief available only in exclusion proceedings would not encourage aliens to leave the country permanently, but would only encourage them—again, if at all—to leave and immediately reenter so as to take advantage of section 212(c) waiver.

not they have recently departed the country.[4] As low a threshold as the rational basis test is, this statutory scheme does not pass.

B

The majority's dismissal of the constitutional problem in the text of section 212(c) also implicitly casts considerable doubt on the constitutionality of a federal regulation. After the Supreme Court held that IIRIRA does not apply retroactively to deny section 212(c) relief to aliens who plead guilty to a charge which would otherwise make them eligible for a section 212(c) waiver prior to the enactment of IIRIRA, *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), the Department of Homeland Security ("DHS") promulgated 8 C.F.R. § 1212.3 to codify the holding in *St. Cyr*. That regulation provides that, assuming an alien in a deportation proceeding meets other requirements, the alien is eligible for section 212(c) relief unless "[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the

---

[4] The majority responds that "it makes perfect sense to want [an LPR] to be outside our borders when" he learns that he will not receive relief. However, as discussed above, an LPR who is stopped at the border for being excludable but who is also eligible for § 212(c) relief will generally be admitted and continue the relief application from within the country. Thus, if he is ultimately denied relief, he will, in fact, be inside our borders when he gets "the bad news."

The majority, I respectfully suggest, quotes Judge Posner out of context. Judge Posner was addressing the rationale for allowing the option of voluntary departure, which occurs *after* a deportation proceeding has been initiated. *See LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998).

Act on a ground which does not have a statutory counterpart in section 212 of the Act." 8 C.F.R. § 1212.3(f)(5).[5] The regulation thus proceeds on the long-standing assumption, which the majority has now overruled in our Circuit, that section 212(c) is applicable to both deportation and exclusion proceedings.

By holding that the statutory language of section 212(c) is clear and that *Francis* and *Tapia-Acuna* did not "accord[ ] sufficient deference" to Congress, the majority has implicitly questioned DHS's authority to enact the above regulation. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the agency, must give effect to the unambiguously expressed intent of Congress."). Under the majority rule, the regulation that has been applied in thousands of cases cannot survive. Those who were eligible to apply for relief yesterday under the regulation are on very uncertain ground today.

C

There is, in sum, no reason to depart from our long-established precedent, developed over many decades in this Circuit and every other. The BIA has acted in reliance on it, and the government has exercised its discretion based on this precedent to grant relief to thousands of individuals. There is no justification for casting the system aside now and throwing thousands of pending applications for section 212(c) relief into ques-

---

[5] The BIA relied on this regulation in affirming the denial of section 212(c) relief to Abebe.

tion, particularly when it is unnecessary to the resolution of this petition to do so.

II

Applying the constitutional analysis discussed in Part I to the present case, I would hold that Abebe is eligible for section 212(c) relief because the specific offense which makes him deportable would also make him excludable. Equal protection demands that we treat equally aliens similarly situated. In cases such as this, it is the act or offense itself that makes one alien similarly situated to another, not the grounds the government chooses to use to deport the aliens. To clarify our caselaw and to bring it into proper constitutional alignment, I would overrule *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994) (applying a comparable grounds test), and follow the lead of the Second Circuit's well-articulated opinion in *Blake*, 489 F.3d 88 (applying an offense-specific test).

As Judge Berzon explained in her thoughtful concurrence to the panel opinion in this case, the comparable ground approach adopted in *Komarenko* is irreconcilable with the equal protection analysis discussed in Part I, *supra*, and in *Tapia-Acuna*. Indeed, the comparable ground approach creates new problems. Just as the distinction between deportable aliens who are alike except that one temporarily left the country while the other did not is arbitrary, the comparable grounds test turns on equally arbitrary grounds.

Consider Alien A, who commits assault with a deadly weapon. He is deportable because his offense falls into the category "aggravated felonies." He is also excludable because that same offense falls into the category "crimes involving moral turpitude." In an ex-

clusion proceeding, his offense, as a "crime of moral turpitude," would make Alien A eligible for a § 212(c) waiver. If he ends up in deportation proceedings, however, he is not eligible for § 212(c) relief, under the comparable grounds test, because the category "aggravated felonies" is sufficiently different from the category of "crimes involving moral turpitude." Alien B, on the other hand, who commits a drug offense is also both deportable and excludable, but is eligible for § 212(c) relief in a deportation proceeding simply because drug offenses were described with similar words in the deportation and exclusion statutes.

This type of classification between aliens who are otherwise similarly situated violates equal protection unless it is rationally related to a legitimate government interest. *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 603 (9th Cir. 2002). Congress is surely informed by important policy considerations when making determinations about which *offenses* make an alien deportable or excludable. Decisions about the size, scope, and overlap of *categories* of deportable and excludable offenses have no rational relation to judgments about which aliens should be permitted to remain in our country and which should not.

As Judge Berzon pointed out, there is one additional inconsistency between the comparable grounds test and the way that section 212(c) relief functions as a practical matter. Once an alien receives a waiver of excludability under either section 212(c) or other waiver provisions, the alien cannot be deported or excluded in the future solely due to the offense on which he received the waiver. This is true even if there is a category of deportable crimes that applies to his offense which is different from the category that permitted the waiver. *See, e.g., Matter of Balderas*, 20 I. & N. Dec.

389, 392 (BIA 1991). In other words, section 212(c) relief is itself offense-specific, not ground-specific.

III

Additionally, I respectfully dissent from the majority's holding that Abebe did not exhaust his claim for withholding of removal. Abebe raised this claim in his notice of appeal before the BIA. The purpose of the administrative exhaustion requirement is so that the "administrative agency [may] have a full opportunity to resolve a controversy or correct its own errors before judicial intervention." *Sagermark v. INS*, 767 F.2d 645, 648 (9th Cir. 1985). When a petitioner raises an issue in his notice of appeal, the BIA has a "full opportunity to resolve [the] controversy," particularly in light of the fact that the petitioner is not required to file an accompanying brief. *See* 8 C.F.R. § 3.38(f) (1999) ("Briefs *may* be filed by both parties...." (emphasis added)). *Ladha v. INS*, 215 F.3d 889, 903 (9th Cir. 2000), was correctly decided. I would hold that Abebe exhausted his claim for withholding of removal and would thus remand to the BIA for consideration of the claim in the first instance.

IV

For all of these reasons, I would find Abebe eligible for section 212(c) relief. To classify aliens based on the happenstance of whether they have recently departed the country and reentered furthers no logical government interest. Similarly, to classify aliens in deportation proceedings whose deportable offense is also a ground for exclusion based on the agency-created category into which the offense happens to fall serves no legitimate government interest. I would hold, following the Second Circuit in *Blake*, 489 F.3d 88, that an alien

in a deportation proceeding is eligible for section 212(c) relief if the offense which makes him deportable would also render him excludable. Applying section 212(c) relief to deportation proceedings using an offense-based analysis is the only constitutional interpretation of the statute. In addition, I would hold that Abebe exhausted his claim for withholding of removal and allow him to pursue that claim on remand. *Tapia-Acuna*, 640 F.2d 223, and *Ladha*, 215 F.3d 889, were rightly decided. *Komarenko*, 35 F.3d 432, should be overruled.

Like the Second Circuit in *Blake*, 489 F.3d at 91, I find Judge Learned Hand's caution particularly apt here: "It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards." *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947). There is no rational basis for treating a lawful permanent resident who steps across the border for a day better than one who does not.

For these reasons, I respectfully dissent.

APPENDIX Q

REPRESENTATIVE CASES ADDRESSING SECTION 212(C) ELIGIBILITY IN LIGHT OF *MATTER OF BLAKE*

FIRST CIRCUIT

Gonzalez-Mesias v. *Mukasey*, 529 F.3d 62 (1st Cir. 2008)

Dalombo Fontes v. *Gonzales*, 483 F.3d 115 (1st Cir. 2008)

Kim v. *Gonzales*, 468 F.3d 58 (1st Cir. 2006)

Matter of Sanchez, 2008 WL 3919110 (BIA July 29, 2008)

Matter of Hercules, 2008 WL 3919079 (BIA July 23, 2008)

Matter of Jacques, 2007 WL 2463895 (BIA July 25, 2007), *pet. for review denied*, No. 09-1033 (1st Cir. Dec. 1, 2009)

Matter of Pimentel, 2006 WL 2803375 (BIA July 26, 2006)

SECOND CIRCUIT

Mignano v. *Holder*, 2010 WL 4187933 (2d Cir. Oct. 25, 2010)

Webster v. *Mukasey*, 259 F. App'x 375 (2d Cir. 2008)

Blake v. *Carbone*, 489 F.3d 88 (2d Cir. 2007)

Matter of Mejicanos-Estrada, 2008 WL 2517578 (BIA June 6, 2008), *remanded*, No. 06-2157 (2d Cir. Feb. 13, 2008)

Matter of Vargas-Gonzalez, 2008 WL 655900 (BIA Feb. 11, 2008)

Matter of Penalo-Almonte, 2007 WL 2463986 (BIA July 31, 2007), *aff'd*, No. 05-5218 (2d Cir. Feb. 8, 2007)

Matter of Shakeri, 2006 WL 901562 (BIA Mar. 10, 2006), *remanded*, No. 06-1625 (2d Cir. Oct. 22, 2007)

Matter of Bo Feng, 2006 WL 901498 (BIA Mar. 9, 2006)

Matter of Donaldson, 2005 WL 3802267 (BIA Nov. 28, 2005)

THIRD CIRCUIT

Bumbury v. *Attorney General*, 375 F. App'x 214 (3d Cir. 2010)

Francois v. *Mukasey*, 264 F. App'x 211 (3d Cir. 2008)

Sudol v. *Mukasey*, 300 F. App'x 157 (3d Cir. 2008)

Caroleo v. *Gonzales*, 476 F.3d 158 (3d Cir. 2007)

Birkett v. *Mukasey*, 252 F. App'x 516 (3d Cir. 2007)

Calderon-Minchola v. *Mukasey*, 258 F. App'x 425 (3d Cir. 2007)

Matter of Evelyn, 2007 WL 4711417 (BIA Dec. 21, 2007)

Matter of Colato, 2006 WL 448280 (BIA Jan. 25, 2006)

Matter of Singh, 2006 WL 448165 (BIA Jan. 18, 2006)

Matter of Martinez-Madrid, 2005 WL 1111829 (BIA Apr. 20, 2005)

FIFTH CIRCUIT

Rodriguez v. *Holder*, 2010 WL 4116810 (5th Cir. Oct. 19, 2010)

Castaneda-Sanchez v. *Holder*, 2010 WL 3824240 (5th Cir. Sept. 23, 2010)

Matter of Rodriguez Soto, 2010 WL 4035435 (BIA Sept. 16, 2010)

Matter of Valette, 2010 WL 3536705 (BIA Aug. 24, 2010)

Matter of Quinones, 2010 WL 3157442 (BIA July 27, 2010)

Matter of Umer, 2010 WL 1606998 (BIA Mar. 31, 2010)

Leon-Medina v. *Holder*, 2009 WL 3489616 (5th Cir. Oct. 29, 2009)

Popoca v. *Holder*, 320 F. App'x 252 (5th Cir. 2009)

Cantu v. *Mukasey*, 267 F. App'x 321 (5th Cir. 2008)

Ruiz v. *Mukasey*, 296 F. App'x 429 (5th Cir. 2008)

Felix v. *Mukasey*, 290 F. App'x 764 (5th Cir. 2008)

Firoozfar v. *Mukasey*, 292 F. App'x 371 (5th Cir. 2008)

Garza-Garcia v. *Mukasey*, 293 F. App'x 282 (5th Cir. 2008)

Melgar v. *Mukasey*, 294 F. App'x 174 (5th Cir. 2008)

Pham v. *Mukasey*, 297 F. App'x 335 (5th Cir. 2008)

Cruz-Marquina v. *Mukasey*, 303 F. App'x 243 (5th Cir. 2008)

Vo v. *Gonzales*, 482 F.3d 363 (5th Cir. 2007)

Avilez-Granados v. *Gonzales*, 481 F.3d 869 (5th Cir. 2007)

Brieva-Perez v. *Gonzales*, 482 F.3d 356 (5th Cir. 2007)

De la Paz Sanchez v. *Gonzales*, 473 F.3d 133 (5th Cir. 2006)

Matter of Villarreal-Perez, 2009 WL 1800073 (BIA June 5, 2009)

Matter of Bright, 2008 WL 5537804 (BIA Dec. 23, 2008)

Matter of Lozano-Torres, 2008 WL 5181736 (BIA Nov. 21, 2008)

Matter of Trevino-Hernandez, 2008 WL 5181797 (BIA Nov. 14, 2008)

Matter of Ramcharran, 2008 WL 4420107 (BIA Sept. 23, 2008)

Matter of Reyes-Huereca, 2008 WL 486877 (BIA Jan. 29, 2008)

Matter of Huynh, 2007 WL 4182297 (BIA Oct. 16, 2007)

Matter of Franco, 2007 WL 2074494 (BIA June 11, 2007)

Matter of Gardea-Perez, 2007 WL 275815 (BIA Jan. 18, 2007)

Matter of Castillo-Salinas, 2006 WL 3485843 (BIA Oct. 12, 2006)

Matter of Dominguez-Vega, 2006 WL 3088960 (BIA Sept. 8, 2006)

SIXTH CIRCUIT

Ikharo v. *Holder*, 614 F.3d 622 (6th Cir. 2010)

Matter of Heer, 2010 WL 1284439 (BIA Mar. 12, 2010)

Koussan v. *Holder*, 556 F.3d 403 (6th Cir. 2009)

Thap v. *Mukasey*, 544 F.3d 674 (6th Cir. 2008)

United States v. *Valencia-Perez*, 2005 WL 2436453 (W.D. Mich. Oct. 3, 2005)

Matter of Erb, 2007 WL 4699927 (BIA Dec. 11, 2007), *pet. for review denied*, 318 F. App'x 392 (6th Cir. 2009)

Matter of Cisneros-Garcia, 2006 WL 3712434 (BIA Nov. 28, 2006)

SEVENTH CIRCUIT

Mancillas-Ruiz v. *Holder*, 2010 WL 3156544 (7th Cir. Aug. 11, 2010)

De Leon v. *Holder*, 2009 WL 1811219 (7th Cir. June 25, 2009)

Zamora-Mallari v. *Mukasey*, 514 F.3d 679 (7th Cir. 2008)

Valere v. *Gonzales*, 473 F.3d 757 (7th Cir. 2007)

Ryan v. *Gonzales*, 222 F. App'x 528 (7th Cir. 2007)

Matter of Baptiste, 2007 WL 4707376 (BIA Dec. 14, 2007), *pet. for review dismissed*, No. 08-1083 (7th Cir. Mar. 10, 2008)

Matter of Ghonim, 2007 WL 1794209 (BIA May 30, 2007)

Matter of Dominguez-Arizmendi, 2007 WL 1724850 (BIA May 22, 2007)

Matter of Arellano-Vasquez, 2006 WL 2008248 (BIA May 24, 2006)

EIGHTH CIRCUIT

Soriano v. *Gonzales*, 489 F.3d 909 (8th Cir. 2007)

Vue v. *Gonzales*, 496 F.3d 858 (8th Cir. 2007)

Matter of Gonzales-Aguilar, 2007 WL 1676901 (BIA May 17, 2007)

NINTH CIRCUIT

Aguilar-Ramos v. *Holder*, 594 F.3d 701 (9th Cir. 2010)

Parada-Chicas v. *Holder*, 2010 WL 4561365 (9th Cir. Nov. 10, 2010)

United States v. *Cardoza-Fuentes*, 2010 WL 4386801 (9th Cir. Nov. 5, 2010)

Pedro v. *Holder*, 2010 WL 4366394 (9th Cir. Nov. 2, 2010)

Navarro v. *Holder*, 2010 WL 4366387 (9th Cir. Oct. 19, 2010)

Mondragon v. *Holder*, 2010 WL 3796422 (9th Cir. Sept. 29, 2010)

Romero-Aguilar v. *Holder*, 2010 WL 3825644 (9th Cir. Sept. 29, 2010)

Cather v. *Holder*, 2010 WL 3825452 (9th Cir. Sept. 27, 2010)

Del Villar v. *Holder*, 2010 WL 3825458 (9th Cir. Sept. 27, 2010)

De Avila-Barbosa v. *Holder*, 2010 WL 3825451 (9th Cir. Sept. 24, 2010)

Toledo v. *Holder*, 2010 WL 3825436 (9th Cir. Sept. 24, 2010)

Briseno-Gutierrez v. *Holder*, 2010 WL 3736094 (9th Cir. Sept. 23, 2010)

Grageola-Berumen v. *Holder*, 2009 WL 3818015 (9th Cir. Sept. 13, 2010)

Reyes-Perez v. *Holder*, 2010 WL 3825461 (9th Cir. Sept. 13, 2010)

Garcia-De la Rosa v. *Holder*, 2010 WL 3516417 (9th Cir. Sept. 7, 2010)

Flores-Pelayo v. *Holder*, 2010 WL 3469223 (9th Cir. Sept. 3, 2010)

Camarillo v. *Holder*, 2010 WL 3448577 (9th Cir. Aug. 31, 2010)

Contreras-Aguilar v. *Holder*, 2010 WL 3452472 (9th Cir. Aug. 31, 2010)

Flores v. *Holder*, 2010 WL 3448588 (9th Cir. Aug. 31, 2010)

Flores-Velasquez v. *Holder*, 2010 WL 3448548 (9th Cir. Aug. 31, 2010)

Gallegos-Carrillo v. *Holder*, 2010 WL 3452475 (9th Cir. Aug. 31, 2010)

Nuila-Chavez v. *Holder*, 2010 WL 3452473 (9th Cir. Aug. 31, 2010)

Rodriguez-Symonds v. *Holder*, 2010 WL 3448587 (9th Cir. Aug. 31, 2010)

Arevalo-Orozco v. *Holder*, 2010 WL 3448580 (9th Cir. Aug. 31, 2010)

Sito v. *Holder*, 2010 WL 2782852 (9th Cir. July 13, 2010)

United States v. *Moriel-Luna*, 585 F.3d 1191 (9th Cir. 2009)

Abebe v. *Holder*, 554 F.3d 1203 (9th Cir. 2009)

Matter of Hernandez, 2009 WL 3818015 (BIA Nov. 3, 2009)

Kwong v. *Holder*, 2009 WL 2981875 (9th Cir. Sept. 17, 2009)

Mendez-Hernandez v. *Holder*, 332 F. App'x 443 (9th Cir. 2009)

Eski v. *Mukasey*, 266 F. App'x 669 (9th Cir. 2008)

Judulang v. *Gonzales*, 249 F. App'x 499 (9th Cir. 2007)

Maaref v. *Gonzales*, 240 F. App'x 202 (9th Cir. 2007)

Sosa v. *Gonzales*, 234 F. App'x 777 (9th Cir. 2007)

Rodriguez-Mata v. *Gonzales*, 235 F. App'x 557 (9th Cir. 2007)

Matter of Obrique, 2008 WL 2401056 (BIA May 23, 2008), *pet. for review denied*, No. 08-72683 (9th Cir. Aug. 9, 2010)

Matter of Rodriguez-Rodriguez, 2008 WL 2401052 (BIA May 23, 2008)

Matter of Kawamura, 2008 WL 1734661 (BIA Mar. 28, 2008)

Matter of Quoc Bui, 2008 WL 762666 (BIA Mar. 6, 2008)

Matter of Castillo, 2008 WL 486908 (BIA Jan. 30, 2008)

Matter of Arellano-De Fitzpatrick, 2007 WL 2463888 (BIA July 24, 2007)

Matter of Nungaray-Guardado, 2007 WL 1676940 (BIA May 21, 2007)

Matter of Lopez-Loera, 2007 WL 1114110 (BIA Mar. 27, 2007)

Matter of Vergara-Ramirez, 2007 WL 1125658 (BIA Feb. 23, 2007)

Matter of Aldaco-Zarate, 2007 WL 275735 (BIA Jan. 11, 2007), *pet. for review dismissed*, No. 07-70534 (9th Cir. June 2, 2010)

Matter of Gonzalez, 2006 WL 3922219 (BIA Dec. 14, 2006)

Matter of Escobedo-Cortinez, 2006 WL 3712532 (BIA Dec. 7, 2006)

Matter of Gonzalez-Uribe, 2006 WL 3712539 (BIA Dec. 6, 2006)

Matter of Cabarle, 2006 WL 3203691 (BIA Aug. 31, 2006)

Matter of Contreras-Vega, 2006 WL 3252538 (BIA Aug. 17, 2006)

Matter of Bueno, 2006 WL 3088798 (BIA Aug. 9, 2006)

Matter of Paredes-Osuna, 2006 WL 2803403 (BIA Aug. 1, 2006)

Matter of Knust De Meester, 2006 WL 2183533 (BIA June 20, 2006)

Matter of Garcia-Garcia, 2006 WL 2183535 (BIA June 20, 2006)

Matter of Rodriguez-Rocha, 2006 WL 2008216 (BIA May 18, 2006)

Matter of Agbayani Agbayani, 2006 WL 1647443 (BIA May 15, 2006), *pet. for review denied*, 383 F. App'x 640 (9th Cir. June 11, 2010)

Matter of Delos Reyes, 2006 WL 901514 (BIA Mar. 8, 2006)

Matter of Banuelos-Delena, 2006 WL 901335 (BIA Mar. 2, 2006)

Matter of Gomez-Perez, 2006 WL 901334 (BIA Mar. 1, 2006)

Matter of Aigner, 2006 WL 448285 (BIA Jan. 25, 2006)

Matter of Carreon-Garcia, 2006 WL 448269 (BIA Jan. 24, 2006)

Matter of Martinez, 2006 WL 448175 (BIA Jan. 17, 2006)

Matter of Rodriguez-Contreras, 2006 WL 448178 (BIA Jan. 17, 2006)

Matter of Cardona, 2005 WL 3709244 (BIA Dec. 27, 2005)

Matter of Cruz-Bravo, 2005 WL 3709363 (BIA Dec. 19, 2005)

Matter of Palomares-Quintero, 2005 WL 3952748 (BIA Aug. 30, 2005)

Matter of Hernandez-Vanegas, 2005 WL 1111836 (BIA Apr. 21, 2005)

TENTH CIRCUIT

Falaniko v. *Mukasey*, 272 F. App'x 742 (10th Cir. 2008)

Alvarez v. *Mukasey*, 282 F. App'x 718 (10th Cir. 2008)

Matter of Arellano Garcia, 2009 WL 3250483 (BIA Sept. 21, 2009)

Matter of Filo Lomu, 2005 WL 3802278 (BIA Nov. 25, 2005)

ELEVENTH CIRCUIT

Palomino-Abad v. *Attorney General*, 366 F. App'x 17 (11th Cir. 2010)

Hernandez v. *Attorney General*, 2010 WL 3836121 (11th Cir. Oct. 4, 2010)

Matter of Leon de Nobrega, 2010 WL 1607096 (BIA Mar. 23, 2010)

De la Rosa v. Attorney General, 579 F.3d 1327 (11th Cir. 2009)

Garcia v. *Mukasey*, 309 F. App'x 306 (11th Cir. 2009)

Barton v. *Attorney General*, 2009 WL 1606823 (11th Cir. June 10, 2009)

Sanchez-Becerra v. *Mukasey*, 289 F. App'x 352 (11th Cir. 2008)

Palomino-Abad v. *Gonzales*, 229 F. App'x 891 (11th Cir. 2007)

Rubio v. *Gonzales*, 182 F. App'x 925 (11th Cir. 2006)

Matter of Romero-Garcia, 2008 WL 5244672 (BIA Nov. 25, 2008)

Matter of Hamdallah, 2008 WL 5181728 (BIA Nov. 21, 2008)

Matter of Tadesse Desta, 2006 WL 3485618 (BIA Oct. 17, 2006)

Matter of Rodriguez, 2006 WL 2803398 (BIA Aug. 3, 2006)

Matter of Dickson, 2006 WL 901555 (BIA Mar. 13, 2006)

OPPOSITION BRIEF

No. 10-694

In the Supreme Court of the United States

JOEL JUDULANG, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly denied relief from removal under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 19

TABLE OF AUTHORITIES

Cases:

A-A-, *In re*, 20 I. & N. Dec. 492 (B.I.A. 1992) 10
Abebe v. *Gonzales*, 493 F.3d 1092 (9th Cir. 2007) 6
Abebe v. *Holder*, 130 S. Ct. 3272 (2010) 7, 18
Abebe v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010) 7, 8
Aguilar-Ramos v. *Holder*, 594 F.3d 701 (9th Cir. 2010) 8
Alvarez v. *Mukasey*, 282 Fed. Appx. 718 (10th Cir. 2008) 8
Avilez-Granados v. *Gonzales*, 481 F.3d 869 (5th Cir. 2007) 15
Birkett v. *Holder*, 129 S. Ct. 2043 (2009) 7
Blake v. *Carbone*, 489 F.3d 88 (2d Cir. 2007) 4, 9, 17
Blake, *In re*, 23 I. & N. Dec. 722 (B.I.A. 2005), remanded, 489 F.3d 88 (2d Cir. 2007) 4, 5, 8, 11, 15
Brieva-Perez, *In re*, 23 I. & N. Dec. 766 (B.I.A. 2005), petition for review denied, 482 F.3d 356 (5th Cir. 2007) 4, 6, 9, 10, 11, 14
Canto v. *Holder*, 131 S. Ct. 85 (2010) 18, 19
Caroleo v. *Gonzales*, 476 F.3d 158 (3d Cir. 2007) 8

Cases—Continued: Page

De la Rosa v. *Attorney Gen.*, 593 F.3d 1327 (11th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010) ... 8
De la Rosa v. *Holder*, 130 S. Ct. 3272 (2010) 7, 18
Falaniko v. *Mukasey*, 272 Fed. Appx. 742 (10th Cir. 2008) 8
Ferguson v. *Holder*, 130 S. Ct. 1735 (2010) 18, 19
Fernandez-Vargas v. *Gonzales*, 548 U.S. 30 (2006) 17
Fiallo v. *Bell*, 430 U.S. 787 (1977) 11, 13
Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976) 2
Gonzalez-Mesias v. *Holder*, 129 S. Ct. 2042 (2009) 7
Granados, *In re*, 16 I. & N. Dec. 726 (B.I.A. 1979) 2
INS v. *St. Cyr*, 533 U.S. 289 (2001) 2, 3, 15, 16
Jerez-Sanchez v. *Holder*, 131 S. Ct. 73 (2010) 18, 19
Kim v. *Gonzales*, 468 F.3d 58 (1st Cir. 2006) 8
Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 11
Komarenko v. *INS*, 35 F.3d 432 (9th Cir. 1994) 4, 12, 13, 14
Koussan v. *Holder*, 556 F.3d 403 (6th Cir. 2009) 8
Leal-Rodriguez v. *INS*, 990 F.2d 939 (7th Cir. 1993) 12, 14
Meza, *In re*, 20 I. & N. Dec. 257 (B.I.A. 1991) 11
Molina-De La Villa v. *Holder*, 130 S. Ct. 1882 (2010) 18, 19
Moreno-Escobosa, *In re*, 25 I. & N. Dec. 114 (B.I.A. 2009) 9
Oceanic Steam Navigation Co. v. *Stranahan*, 214 U.S. 320 (1909) 11

Cases—Continued: Page

Ramirez-Canales v. *Mukasey*, 517 F.3d 904 (6th Cir. 2008) 16
Rodriguez-Cortes, In re, 20 I. & N. Dec. 587 (B.I.A. 1992) 10
Silva, In re, 16 I. & N. Dec. 26 (B.I.A. 1976) 2
T-, In re, 6 I. & N. Dec. 410 (B.I.A. 1954) 16
Ukofia v. *Holder*, 131 S. Ct. 191 (2010) 7
United States R.R. Ret. Bd. v. *Fritz*, 449 U.S. 166 (1980) 13
Vo v. *Gonzales*, 482 F.3d 363 (5th Cir. 2007) 8
Vue v. *Gonzales*, 496 F.3d 858 (8th Cir. 2007) 8
Wadud, In re, 19 I. & N. Dec. 182 (B.I.A. 1984) 2
Wisniewski v. *United States*, 353 U.S. 901 (1957) 9
Zamora-Mallari v. *Mukasey*, 514 F.3d 679 (7th Cir. 2008) 8, 15

Constitution, statutes and regulations:

U.S. Const. Amend V (Due Process Clause) 9
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277 3
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C:
§ 304(b), 110 Stat. 3009-597 3
§§ 303-306, 110 Stat. 3009-585 3
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a)(43)(A) 10
8 U.S.C. 1101(a)(43)(F) 5, 14
8 U.S.C. 1101(a)(43)(G) 5

Statutes and regulations—Continued: Page

8 U.S.C. 1182 (§ 212) 12
8 U.S.C. 1182(a) (§ 212(a)) 14, 15
8 U.S.C. 1182(a)(2)(A)(i)(I)
(§ 212(a)(2)(A)(i)(I)) 10, 11, 14
8 U.S.C. 1182(c) (1994) (§ 212(c)) ..... *passim*
8 U.S.C. 1227 12
8 U.S.C. 1227(a)(2)(A)(ii) 5
8 U.S.C. 1227(a)(2)(A)(iii) 5
8 U.S.C. 1227(a)(2)(C) 15
8 C.F.R.:
Section 1212.3(f) 3
Section 1212.3(f)(5) 3, 4, 9, 15

Miscellaneous:

Executive Office for Immigration Review, U.S. Dep't of Justice:
FY 2008 Statistical Year Book (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf 17
FY 2010 Statistical Year Book (2011), http://www.justice.gov/eoir/statspub/fy10syb.pdf 18

In the Supreme Court of the United States

No. 10-694

JOEL JUDULANG, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter* but is reprinted at 249 Fed. Appx. 499. The opinions of the Board of Immigration Appeals (Pet. App. 5a-9a) and the immigration judge (Pet. App. 11a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2007. A petition for rehearing was denied on August 26, 2010 (Pet. App. 21a). The petition for a writ of certiorari was filed on November 24, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. By its terms, Section 212(c) applied only to certain aliens in exclusion proceedings (*i.e.*, proceedings in which aliens were seeking to "be admitted" to the United States after "temporarily proceed[ing] abroad voluntarily"). In 1976, however, the Second Circuit determined that making that discretionary relief available to aliens who had departed the United States while denying it to aliens who remained in the United States violated equal protection. *Francis* v. *INS*, 532 F.2d 268, 273. The Board of Immigration Appeals (Board) adopted that rationale on a nationwide basis in *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976), so that Section 212(c) was generally construed as being available in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In applying the principle of treating those in deportation proceedings like those in exclusion proceedings, the Board has long maintained that an alien in deportation proceedings can obtain Section 212(c) relief only if the ground for his deportation has a comparable ground among the statutory grounds of exclusion. See, *e.g.*, *In re Wadud*, 19 I. & N. Dec. 182 (B.I.A. 1984); *In re Granados*, 16 I. & N. Dec. 726 (B.I.A. 1979). That practice is known as the "comparable ground" or "statutory

counterpart" test, and it has been codified by regulation at 8 C.F.R. 1212.3(f)(5).[1]

In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress amended Section 212(c) to render ineligible for discretionary relief any alien previously convicted of certain offenses, including an aggravated felony. Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety. IIRIRA also did away with the distinction between "deportation" and "exclusion" proceedings, designating them both as "removal" proceedings. See §§ 303-306, 110 Stat. 3009-585.

In *INS* v. *St. Cyr*, *supra*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony on the basis of a guilty plea agreement that the alien entered into at a time when the sentence the alien received under the plea agreement would not have rendered him ineligible for relief under former Section 212(c), but a greater sentence (of five years or more) would have done so. 533 U.S. at 314-326. Although some aliens necessarily benefitted from the conclusion that Section 212(c)'s repeal was not retroactively applicable, the Court did not suggest that aliens would be exempt from any pre-existing

---

[1] In pertinent part, 8 C.F.R. 1212.3(f) states:

An application for relief under former section 212(c) of the Act shall be denied if: • • • (5) The alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.

limitations on their eligibility for relief under Section 212(c), including the "statutory counterpart" test.

As relevant to the circumstances of this case, the operation of that test was further clarified by the Board in *In re Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005), remanded, 489 F.3d 88 (2d Cir. 2007), and *In re Brieva-Perez*, 23 I. & N. Dec. 766 (B.I.A. 2005), petition for review denied, 482 F.3d 356 (5th Cir. 2007). Those cases held that a statutory ground of exclusion is a "comparable ground[]" to the charged ground of deportation only if the two grounds use similar language to describe "substantially equivalent categories of offenses." *In re Brieva-Perez*, 23 I. & N. Dec. at 771; *In re Blake*, 23 I. & N. Dec. at 728. In *In re Blake*, the Board held that the "crime involving moral turpitude" ground of inadmissibility was not comparable to the ground of removal of having an aggravated felony conviction for sexual abuse of a minor. *Id.* at 729. In *In re Brieva-Perez*, the Board similarly held that the "crime involving moral turpitude" ground of inadmissibility was not comparable to the ground of removal of having an aggravated felony conviction for a crime of violence. 23 I. & N. Dec. at 773. Well before the Board published those precedential decisions, however, the analytical underpinnings of its interpretation had been confirmed by, among others, the Ninth Circuit's decision in *Komarenko* v. *INS*, 35 F.3d 432 (1994).

In 2007, the Second Circuit disagreed with *Komarenko* and the "several other circuits" that had followed it. See *Blake* v. *Carbone*, 489 F.3d 88, 103-104. The Second Circuit recognized that the statutory-counterpart test codified in 8 C.F.R. 1212.3(f)(5) did "nothing more than crystallize the agency's preexisting body of law and therefore [could not] have an impermissible retroactive

effect"; but the Second Circuit held that, when analyzed on the basis of a "particular criminal offense[]," the ground of inadmissibility for a "crime involving moral turpitude" was sufficiently comparable to an aggravated felony of sexual abuse of a minor to permit relief under former Section 212(c). *Blake*, 489 F.3d at 98-99, 101, 103.

2. Petitioner was born in the Philippines in 1966 and entered the United States in 1974. Pet. App. 2a, 14a. In 1989, petitioner was convicted of voluntary manslaughter in California state court, for which he received a suspended sentence of six years of imprisonment and four years of probation, conditioned on his spending 684 days in county jail. *Id.* at 4a, 15a, 31a-32a. In 2003, he was convicted of grand theft of property valued at more than $400. *Id.* at 14a. Based on the latter conviction, petitioner was placed in removal proceedings in 2005, though additional charges of removability were later lodged, based on his 1989 conviction and for having committed two or more crimes involving moral turpitude. *Id.* at 11a-12a, 33a-34a. In the initial proceedings, petitioner admitted that he was not a citizen of the United States. *Id.* at 14a.

On September 28, 2005, an immigration judge ruled that petitioner was subject to removal on three grounds: under 8 U.S.C. 1227(a)(2)(A)(iii) as an alien who has been convicted of an aggravated felony (specifically, "a theft offense," as defined at 8 U.S.C. 1101(a)(43)(G)); as an alien convicted of an aggravated felony (specifically, a "crime of violence," as defined at 8 U.S.C. 1101(a)(43)(F)); and under 8 U.S.C. 1227(a)(2)(A)(ii) as an alien convicted of "two or more crimes involving moral turpitude." Pet. App. 14a-16a. The immigration judge found that petitioner was "not eligible for any

forms of relief," including under former Section 212(c), and ordered him removed to the Republic of the Philippines. *Id.* at 17a.

On February 3, 2006, the Board dismissed petitioner's appeal. Pet. App. 5a-9a. Before the Board, petitioner claimed that he had obtained derivative United States citizenship through his parents, but the Board found that the evidence did not bear out that claim. *Id.* at 6a-7a. The Board also determined that petitioner's voluntary manslaughter conviction rendered him removable, and further held that he was ineligible for discretionary relief from removal under former Section 212(c) because "the 'crime of violence' aggravated felony category has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act." *Id.* at 8a (citing *In re Brieva-Perez*, *supra*). Having determined that petitioner's manslaughter conviction was "sufficient, standing alone, to render him removable and ineligible for relief," the Board found it unnecessary to determine "whether his 2003 grand theft conviction would also constitute a valid factual predicate for deportability." *Id.* at 9a.

3. Petitioner sought judicial review of the Board's decision, and the Ninth Circuit denied his petition for review. Pet. App. 1a-4a. The court determined that petitioner "failed to create a genuine issue of material fact regarding his claim of citizenship." *Id.* at 4a. The court further concluded that petitioner's challenge to the Board's holding that he was ineligible for relief under the "statutory counterpart" theory was foreclosed by the panel decision in *Abebe* v. *Gonzales*, 493 F.3d 1092, 1104-1105 (9th Cir. 2007), which the court found to be "controlling." Pet. App. at 4a. (The panel decision in *Abebe* was later superseded by an en banc decision that

rested on somewhat different grounds. See *Abebe* v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010)).[2]

4. Petitioner filed a petition for rehearing en banc, which—after the en banc proceedings in *Abebe* had concluded—was denied, with no member of the panel and no judge in regular active service requesting a poll. Pet. App. 21a.

ARGUMENT

The decision of the court of appeals is correct. The issue concerns a statutory section repealed almost 14 years ago, and is therefore of greatly diminished importance. Moreover, every court of appeals to have addressed the question (except the Second Circuit) would deny petitioner relief. This court has recently denied certiorari in a number of cases presenting a similar question. See *Ukofia* v. *Holder*, 131 S. Ct. 191 (2010) (No. 09-11395); *De la Rosa* v. *Holder*, 130 S. Ct. 3272 (2010) (No. 09-594); *Abebe* v. *Holder*, 130 S. Ct. 3272 (2010) (No. 09-600); *Birkett* v. *Holder*, 129 S. Ct. 2043 (2009) (No. 08-6816); *Gonzalez-Mesias* v. *Holder*, 129 S. Ct. 2042 (2009) (No. 08-605).[3] Further review is similarly unwarranted in this case.[4]

---

[2] The en banc court's decision in *Abebe* is reprinted at Pet. App. 63a-94a.

[3] Petitioner suggests that this case is a better vehicle than were *De la Rosa* and *Abebe* because Justice Kagan would have been recused in those cases. See Pet. 5, 33. But the Court has already denied certiorari in another case, *Ukofia* v. *Holder*, *supra*, that did not involve such a recusal.

[4] A similar question is one of the questions presented in the petition for a writ of certiorari in *Johnson* v. *Holder*, No. 10-730 (filed Dec. 1, 2010).

1. As petitioner acknowledges (Pet. 13 n.7), the First, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have concluded in published opinions that the Board's application of the statutory-counterpart test constitutes a permissible interpretation of former Section 212(c) and does not violate equal protection. See, *e.g.*, *Kim* v. *Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); *Caroleo* v. *Gonzales*, 476 F.3d 158, 162-163 (3d Cir. 2007); *Vo* v. *Gonzales*, 482 F.3d 363, 371-372 (5th Cir. 2007); *Koussan* v. *Holder*, 556 F.3d 403, 412-414 (6th Cir. 2009); *Zamora-Mallari* v. *Mukasey*, 514 F.3d 679, 691-692 (7th Cir. 2008); *Vue* v. *Gonzales*, 496 F.3d 858, 860-862 (8th Cir. 2007); *De la Rosa* v. *Attorney General*, 579 F.3d 1327 (11th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010).[5]

In addition, the Ninth Circuit's en banc decision in *Abebe* v. *Mukasey*, 554 F.3d 1203, 1206-1207 (2009), cert. denied, 130 S. Ct. 3272 (2010), essentially comports with those circuits with regard to the statutory-counterpart rule. Although *Abebe* disagreed with the proposition that there is any constitutional basis for applying former Section 212(c) to aliens in deportation (as opposed to exclusion) proceedings, it left in place the regulation implementing the statutory-counterpart test, which means that the Board's reasoning in *In re Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005), still applies in the Ninth Circuit. See *Abebe*, 554 F.3d at 1207 (stating that the decision does not "cast[] any doubt on the regulation" that codified the Board's statutory-counterpart rule); see also *Aguilar-Ramos* v. *Holder*, 594 F.3d 701, 706

---

[5] As petitioner notes (Pet. 13 n.7), the Tenth Circuit has applied the statutory-counterpart rule in unpublished decisions. See *Alvarez* v. *Mukasey*, 282 Fed. Appx. 718, 723 (2008); *Falaniko* v. *Mukasey*, 272 Fed. Appx. 742, 746-748 (2008).

(9th Cir. 2010) (applying 8 C.F.R. 1212.3(f)(5) and finding alien ineligible for Section 212(c) relief because the grounds for his removal did not have statutory counterparts among the grounds of inadmissibility); *In re Moreno-Escobosa*, 25 I. & N. Dec. 114, 117 (B.I.A. 2009) ("[T]he Ninth Circuit's decision in *Abebe* v. *Mukasey* can be fairly read as rejecting the equal protection challenge to the application of the statutory counterpart rule.").[6]

Thus, despite petitioner's references to a three-way division in the circuits (Pet. 2, 4, 17, 18), there is no effective difference—in terms of sustaining the Board's application of the statutory-counterpart rule—between the Ninth Circuit's decision and the decisions of the seven other circuits that have agreed with the reasoning of the Board's decision in *In re Blake*. The only court of appeals to have reached a different result is the Second Circuit, in *Blake* v. *Carbone*, 489 F.3d 88, 103-104 (2007).

2. Contrary to petitioner's contention (Pet. 27-28), the statutory-counterpart rule applied by the Board does not violate the equal protection component of the Fifth Amendment's Due Process Clause.

Petitioner argues (Pet. 24) that the Board's decision in *In re Blake* "creates an irrational distinction between deportable [lawful permanent residents] who have traveled abroad and reentered and [those] who have not,

---

[6] Petitioner contends (Pet. 14 n.8) that the Ninth Circuit "has been inconsistent" in applying the holding of the en banc court in *Abebe* in some of its unpublished opinions. Even if that were true, this Court does not grant review to resolve intra-circuit disagreements, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), especially in unpublished decisions. And there is no doubt in this case that petitioner would not have prevailed under the rule followed in the great majority of the circuits, because the court of appeals' decision here (Pet. App. 4a) was based on the Board's decision in *In re Brieva-Perez* and the 2007 *panel* opinion in *Abebe*, which followed the majority approach.

contrary to Section 212(c) as it has consistently been interpreted and contrary to equal protection." Petitioner thus essentially contends as follows: If he had left the United States and attempted to return, his conviction for voluntary manslaughter could have subjected him to removal based on a charge of inadmissibility for having committed "a crime of moral turpitude" under Section 212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. 1182(a)(2)(A)(i)(I), and that would have made him eligible for Section 212(c) relief. Petitioner contends that it is irrational for him to be ineligible for Section 212(c) relief because he remained within the United States, and thus to be subject to removal based on the charge of having been convicted of a crime-of-violence aggravated felony—a ground that the Board holds is not comparable to the inadmissibility ground of having been convicted of a crime involving moral turpitude. *In re Brieva-Perez*, *supra*. That argument is without merit.

a. Petitioner contends that, until 2004, the Board "ruled that [lawful permanent residents] could seek waivers of deportation for aggravated felony convictions, including 'crimes of violence' under 8 U.S.C. §1101(a)(43)(F) and 'sexual abuse of a minor' under §1101(a)(43)(A)." Pet. 9-10 (footnotes omitted). But, of the fourteen decisions of the Board that petitioner cites (Pet. 10 nn.5-6), only two were precedential, and neither of them directly addressed the statutory-counterpart rule. The first, *In re Rodriguez-Cortes*, 20 I. & N. Dec. 587 (B.I.A. 1992), addressed only the issue of whether a sentence-enhancement provision (which permitted the imprisonment served to exceed the five years then required to bar relief under Section 212(c)) necessarily caused a conviction to constitute one involving a firearm. *Id.* at 590. The second decision, *In re A-A-*, 20 I. & N.

Dec. 492 (B.I.A. 1992), held that the alien had been convicted of an aggravated felony and served the term of imprisonment that barred him from Section 212(c) relief. *Id.* at 500-503. In each case, the underlying conviction was for murder, but neither Board decision specifically addressed or held, as petitioner suggests, that a crime involving moral turpitude under 8 U.S.C. 1182(a)(2)(A)(i)(I) is a ground of inadmissibility comparable to murder. Petitioner thus cites no precedential Board decision holding that an alien who had been convicted of a crime rendering him deportable as an aggravated felon on the ground of "sexual abuse of a minor" or a "crime of violence" was categorically eligible for Section 212(c) relief if his particular crime could have served as a basis for inadmissibility. Moreover, to the extent that the non-precedential decisions cited by petitioner are based on *In re Meza*, 20 I. & N. Dec. 257 (B.I.A. 1991), the Board affirmatively distinguished that decision in its precedential decision in *In re Blake*. See 23 I. & N. Dec. at 724-728. *In re Blake* in turn was closely followed in *In re Brieza-Perez*, *supra*, which is the only precedential Board decision to have specifically addressed the question in the context of a crime-of-violence aggravated felony.

b. As this Court has repeatedly stated: "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)). Thus, whether an immigration provision is constitutional depends only on the existence of a "facially legitimate and bona fide reason" for its enactment. *Id.* at 794 (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972)).

As a general matter, Congress has determined that the statutory regime that applies to an alien who has already been admitted to the country is different from the one that applies to an alien who is seeking admission. Compare 8 U.S.C. 1182, with 8 U.S.C. 1227. It is thus unsurprising that the categories of offenses that make an alien inadmissible to the country are not always the same as those that may render an alien deportable from the country. That fundamental legislative choice shows that aliens who are inadmissible are not situated similarly to aliens who are deportable, even though there is some overlap between the conduct that renders an alien inadmissible and the conduct that renders an alien deportable. It is only when a ground that renders an alien deportable under the one regime has a statutory counterpart that renders an alien inadmissible under the other regime that there could be any basis for concluding that the two aliens are similarly situated for equal protection purposes (and on that theory to warrant the application of former Section 212(c) to the category of aliens to whom it did not, by its own terms, apply).

The reasoning employed in *Komarenko* v. *INS*, 35 F.3d 432 (9th Cir. 1994)—which the Ninth Circuit had continued to endorse until the en banc opinion in *Abebe* (see Pet. App. 72a (Clifton, J., concurring)), and which has also been endorsed by most of the other courts of appeals—is persuasive. In *Komarenko*, the court rejected a similar equal protection claim in finding that two groups of aliens convicted of different crimes were not similarly situated for purposes of eligibility for Section 212(c) relief. 35 F.3d at 435. The court concluded that the "linchpin of the equal protection analysis in this context is that the two provisions be 'substantially identical.'" *Ibid.*; see also *Leal-Rodriguez* v. *INS*, 990 F.2d

939, 952 (7th Cir. 1993). Komarenko contended that the court was required to "focus on the facts of his individual case and conclude that because he *could have been* excluded under the moral turpitude provision, he has been denied equal protection." *Komarenko*, 35 F.3d at 435. The court, however, refused "to speculate whether the I.N.S. would have applied this broad excludability provision to an alien in Komarenko's position," because engaging in such speculation "would extend discretionary review to every ground for deportation that could constitute 'the essential elements of a crime involving moral turpitude.'" *Ibid.* Such an approach would be tantamount to "judicial legislating," would "vastly overstep" the courts' "limited scope of judicial inquiry into immigration legislation," and "would interfere with the broad enforcement powers Congress has delegated to the Attorney General." *Ibid.* (quoting *Fiallo*, 430 U.S. at 792). Accordingly, the court "decline[d] to adopt a factual approach to * * * equal protection analysis in the context of the deportation and excludability provisions of the INA," and it "conclude[d] that Komarenko was not denied his constitutional right to equal protection of the law." *Ibid.*

Thus, under the rational-basis standard of review, Congress may draw lines on the basis of general categories of offenses as defined by statutes, without regard to the factual circumstances of a particular individual. See, *e.g.*, *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). It is only when the statutory ground for a deportable alien's removal from the country has a statutory counterpart in the grounds for inadmissibility that a deportable alien is arguably similarly situated to inadmissible aliens. See *Komarenko*, 35 F.3d at 435. As the Seventh Circuit has explained:

> [C]ertain deportable aliens may receive exclusion-type relief as if they were subject to exclusion rather than deportation. But that fiction requires that the aliens be excludable *for the same reasons* that render them deportable—a situation not necessarily true for all aliens facing deportations. Accordingly, [S]ection 212(c) relief was not extended to aliens whose deportability was based on a ground for which a comparable ground of exclusion did not exist.

Leal-Rodriguez, 990 F.2d at 949 (emphasis added). The court in *Leal-Rodriguez* held that an alien who was deportable for entering the United States without inspection was not eligible for Section 212(c) relief because there was no corresponding ground of inadmissibility to the deportation charge. *Id.* at 948, 950.

In this case, petitioner's argument similarly fails because his ground of deportation (for having been convicted of the aggravated felony of a crime of violence) is not "substantially equivalent" or "substantially identical" to a ground of inadmissibility under Section 212(a) of the INA. *Komarenko*, 35 F.3d at 435. As the Board correctly reasoned in *In re Brieva-Perez*, a crime of violence under 8 U.S.C. 1101(a)(43)(F) lacks a statutory counterpart among the grounds of inadmissibility in Section 212(a). Although the circumstances underlying a crime of violence may also give rise to the conclusion in some circumstances that the alien has committed "a crime involving moral turpitude" under Section 212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. 1182(a)(2)(A)(i)(I), the latter category addresses a distinctly different category of offenses than a charge for a crime-of-violence aggravated felony. Thus, while the statutory-counterpart test does not require a perfect match, the ground of

inadmissibility must address essentially the same category of offense on which the removal charge is based.

Under the pertinent regulations and the Board's decisions, that test is not met merely by showing that some (or even many) of the aliens whose offenses are included in a given category could also have their crimes characterized as ones involving moral turpitude. See, *e.g.*, *Zamora-Mallari*, 514 F.3d at 693 (holding that the aggravated felony of sexual abuse of a minor has no statutory counterpart); *Avilez-Granados* v. *Gonzales*, 481 F.3d 869, 871-872 (5th Cir. 2007) (same). That analysis is firmly supported by the unanimous decisions of the courts of appeals holding that a firearms offense (which is a ground of removability under 8 U.S.C. 1227(a)(2)(C)) has no statutory counterpart under Section 212(a), even though "many firearms offenses may also be crimes of moral turpitude."[7] *In re Blake*, 23 I. & N. Dec. at 728.

Thus, because petitioner is not similarly situated to an inadmissible alien who has been convicted of a crime

---

[7] For the same reason, petitioner's contention (Pet. 17) that the Board erroneously interpreted 8 C.F.R. 1212.3(f)(5) so as to "undermine" this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), rather than "implement" it, fails. Petitioner argues that the Board, in *In re Blake*, impermissibly interpreted 8 C.F.R. 1212.3(f)(5) inconsistently with its "prior rulings that [a lawful permanent resident alien] deportable for an aggravated felony conviction was eligible for Section 212(c) relief if the conviction would also fall under a counterpart inadmissibility provision." Pet. 29 (emphasis omitted). But petitioner's characterization of the Board's prior practice is flawed, because it overlooks the fact that the Board has always considered whether the charged ground of deportability compared with any ground of inadmissibility, and not whether the alien's crime could have formed the basis for a different charge of inadmissibility. See *In re Blake*, 23 I. & N. Dec. at 728. As a result, petitioner's assertions (Pet. 29, 31) about "retroactive application" of 8 C.F.R. 1212.3(f)(5) are unfounded.

involving moral turpitude, and because he is not being treated any differently than other aliens who are deportable upon grounds that themselves have no corresponding ground of inadmissibility, his equal protection claim is meritless.[5]

3. Although the Second Circuit has reached a different result, this case does not present a question of sufficient importance to warrant this Court's review. The Second Circuit is an outlier: eight other circuits, including the Ninth Circuit below, have approved the Board's approach in *In re Blake*. And this Court denied certiorari on this issue twice in 2009 and three more times in 2010, well after the Second Circuit had issued its deci-

---

[5] Petitioner contends (Pet. 28 & n.16) that the relevant comparison should be between deportable aliens who have left the country and those who have not, because a deportable alien who left the country could be treated as if he had been put into proceedings upon reentry such that relief was available *nunc pro tunc*. But the cases in which the Board has applied Section 212(c) or its predecessor provisions make clear that, although "[i]t has long been the administrative practice to exercise the discretion permitted by the foregoing provisions of law, *nunc pro tunc*," the Board does so only "where complete justice to an alien dictates such extraordinary action." *In re T–*, 6 I. & N. Dec. 410, 413 (B.I.A. 1954). Thus, while "the equitable power to grant orders *nunc pro tunc* is conceptually broad," *Ramirez-Canales* v. *Mukasey*, 517 F.3d 904, 910 (6th Cir. 2008), its application is wholly discretionary and is limited to extraordinary cases—not to every case where an alien would otherwise be eligible for relief. For the same reasons that petitioner is not similarly situated to an alien who departed and is seeking to re-enter, complete justice would not mandate the application of *nunc pro tunc* discretion.

Moreover, notwithstanding petitioner's attempt to discount its relevance (Pet. 16 n.10), his 2003 felony conviction for grand theft could be taken into account in evaluating whether such *nunc pro tunc* discretion should be exercised. It would also be relevant in deciding whether—if he were found eligible for it—he should be granted discretionary relief under former Section 212(c).

sion in *Blake* v. *Carbone*. See p. 7, *supra*. Moreover, the question petitioner raises concerns an alien's eligibility for a form of discretionary relief under a statute that was repealed almost 14 years ago and is only potentially applicable to him on the theory that he might have relied on being eligible for it had his removal proceedings been initiated before the 1996 enactments. See *INS* v. *St. Cyr*, 533 U.S. 289, 325 (2001).

But the statutory-counterpart test to which petitioner objects is not new—indeed, it long predates the repeal of Section 212(c) in 1996. See pp. 2-3, *supra*; *Blake*, 489 F.3d at 98-99. Petitioner could have easily avoided its effects by departing the country voluntarily at any point before his removal proceedings were initiated in 2005 (or at least between the end of his 1989 six-year suspended sentence for voluntary manslaughter and the offense leading to his 2003 conviction for grand theft). Cf. *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 44 (2006) ("It is therefore the alien's choice to continue his illegal presence * * * that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out.").

In contending that his case presents an issue of exceptional importance, petitioner cites a statistic about 10,000 grants of Section 212(c) relief between 1989 and 1995. Pet. 32 (quoting *St. Cyr*, 533 U.S. at 296). That figure is of little relevance here, not only because of its age but also because Section 212(c) was still in effect between 1989 and 1995. In recent years, the number of grants of relief under former Section 212(c) has been smaller and declining. It went from 1905 grants in FY 2004 to 857 grants in FY 2010—a 55% decline. See Executive Office for Immigration Review, U.S. Dep't of

Justice, *FY 2008 Statistical Year Book* Table 15, at R3 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf; Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2010 Statistical Year Book* Table 15, at R3 (2011), http://www.justice.gov/eoir/statspub/fy10syb.pdf. Over that same period, the number of applications for relief under former Section 212(c) fell even more dramatically. In FY 2004, there were 2617 applications; in FY 2008, there were 1281; and in FY 2010, there were 507. That reflects an 81% decline since FY 2004—and a 60% decline since FY 2008.[9]

Of course, the number of aliens who could be affected by the issue in this case would necessarily be even smaller, since an alien would not become eligible for discretionary relief under petitioner's theory unless he or she met, at a minimum, each of the following criteria: (1) the alien must have lawful-permanent-resident status; (2) the alien must have a conviction predating the repeal of Section 212(c); (3) that conviction must have

---

[9] These figures, which are based on both published and unpublished statistics compiled by the Executive Office of Immigration Review through FY 2010, extend the FY 2009 figures cited in the government's briefs opposing certiorari in *Ferguson* v. *Holder*, No. 09-263, cert. denied, 130 S. Ct. 1735 (2010); *Molina-De La Villa* v. *Holder*, No. 09-640, cert. denied, 130 S. Ct. 1882 (2010); *De la Rosa* v. *Holder*, No. 09-594, cert. denied, 130 S. Ct. 3272 (2010); *Abebe* v. *Holder*, No. 09-600, cert. denied, 130 S. Ct. 3272 (2010); *Jerez-Sanchez* v. *Holder*, No. 09-1211, cert. denied, 131 S. Ct. 73 (2010); and *Canto* v. *Holder*, No. 09-1333, cert. denied, 131 S. Ct. 85 (2010). In *Molina-De La Villa*, *supra*, the petitioner's reply brief (at 6) noted that previous editions of the *Statistical Year Book* had reported lower numbers of 212(c) grants for some years. The higher figures in the more recent editions of the *Statistical Year Book* reflected a database conversion that more accurately captured the number of aliens with requests for relief under former Section 212(c).

resulted from a plea of guilty or no contest (rather than a trial);[10] (4) if it occurred after 1990, that conviction must have resulted in a sentence of less than five years; and (5) the charge of removal must have no comparable ground of inadmissibility except when considered on the basis of the facts of the underlying offense. Given the limited and diminishing nature of that class, petitioner's assertion (Pet. 31) that the case presents an issue of "[e]xceptional [a]nd [c]ontinuing [i]mportance" fails.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

FEBRUARY 2011

---

[10] In some circuits, *St. Cyr* has been applied to allow some aliens who were convicted after a trial to be eligible for relief under former Section 212(c). The Court most recently denied certiorari on that question in *Jerez-Sanchez*, *supra*; *Canto*, *supra*; *Ferguson*, *supra*; and *Molina-De La Villa*, *supra*.

REPLY BRIEF

BRIEFS

MAR 15 2011
OFFICE OF THE CLERK

No. 10-694

IN THE

Supreme Court of the United States

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

SETH P. WAXMAN
PAUL R. Q. WOLFSON
JAMES L. QUARLES III
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

MARK C. FLEMING
Counsel of Record
MEGAN BARBERO
ELIZABETH KENT CULLEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

Library of ... Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Page(s)

Abebe v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009) 2, 7

Blake v. *Carbone*, 489 F.3d 88 (2d Cir. 2007) 3, 11, 12

Carr v. *INS*, 86 F.3d 949 (9th Cir. 1996) 8

Castro v. *Holder*, 2010 WL 4683882 (9th Cir. Nov. 19, 2010) (unpublished) 3

Cordes v. *Gonzales*, 421 F.3d 889 (9th Cir. 2005) 6, 8

Cruz v. *Attorney General*, 452 F.3d 240 (3d Cir. 2006) 5

De la Rosa v. *U.S. Attorney General*, 579 F.3d 1327 (11th Cir. 2009) 2, 9

De Nobrega v. *U.S. Attorney General*, 2010 WL 5174955 (11th Cir. Dec. 22, 2010) (unpublished) 2

Fernandez-Vargas v. *Gonzales*, 548 U.S. 30 (2006) 7

Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976) 8

INS v. *St. Cyr*, 533 U.S. 289 (2001) 4

Jordan v. *De George*, 341 U.S. 223 (1951) 12

Komarenko v. *INS*, 35 F.3d 432 (9th Cir. 1994) 7

Lovan v. *Holder*, 574 F.3d 990 (8th Cir. 2009) 4

Matter of A-A-, 20 I. & N. Dec. 492 (BIA 1992) 5, 6

Matter of Arias-Uribe, 13 I. & N. Dec. 696 (BIA 1971) 10

Matter of Blake, 23 I. & N. Dec. 722 (BIA 2005) 3

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of Cardona, 2005 WL 3709244 (BIA Dec. 27, 2005) 3, 8

Matter of G-A-, 7 I. & N. Dec. 274 (BIA 1956) 10

Matter of Hernandez-Casillas, 20 I. & N. Dec. 262 (Att'y Gen. 1991) 7, 10

Matter of K-, 9 I. & N. Dec. 585 (BIA 1962) 10

Matter of L-, 1 I. & N. Dec. 1 (Att'y Gen. 1940) 8

Matter of Orrosquieta, 2003 WL 23508672 (BIA Dec. 19, 2003) 8

Matter of Paniagua Zavala, 2011 WL 585614 (BIA Feb. 3, 2011) 3

Matter of Rodriguez-Cortes, 20 I. & N. Dec. 587 (BIA 1992) 5

Matter of S-, 6 I. & N. Dec. 392 (BIA 1954) 10

Ng Fung Ho v. *White*, 259 U.S. 276 (1922) 4

Padilla v. *Kentucky*, 130 S. Ct. 1473 (2010) 4

Perez-Enriquez v. *Gonzales*, 463 F.3d 1007 (9th Cir. 2006) 5

Ramos-Ruiz v. *Holder*, 2010 WL 5158569 (9th Cir. Dec. 15, 2010) (unpublished) 3

Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 11

Sito v. *Holder*, 387 F. App'x 700 (9th Cir. 2010) (unpublished) 2

Ukofia v. *Holder*, 131 S. Ct. 191 (2010) (No. 09-11395) 4

Williams v. *Vermont*, 472 U.S. 14 (1985) 11

TABLE OF AUTHORITIES—Continued

Page(s)

DOCKETED CASES

Appellees' Brief, *Cordes* v. *Gonzales*, No. 04-15988 (9th Cir. Oct. 12, 2004) 6

Appellee's Brief, *United States* v. *Magana-Cancino*, 2010 WL 3950080 (9th Cir. Feb. 11, 2010) 2

Appellee's Brief, *United States* v. *Ubaldo-Figueroa*, 2002 WL 32254035 (9th Cir. Oct. 10, 2002) 6

STATUTES

Cal. Penal Code § 245(a)(2) 8

OTHER AUTHORITIES

Aleinikoff, Thomas Alexander, et al., *Immigration: Process & Policy* (3d ed. 1995) 7

Duff, James C., *Judicial Business of the United States Courts: 2010 Annual Report of the Director* (2011) 2

BIA Practice Manual (rev. July 30, 2004) 5

IN THE

Supreme Court of the United States

No. 10-694

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The government does not dispute that the question presented has split the circuits, has been fully aired, and is critically significant to hundreds of lawful permanent residents (LPRs), nor that this case is an ideal vehicle. It instead argues that the decision below "is correct" (Opp. 7), which is both wrong and not a reason to deny review where the circuits are irretrievably split. The petition should be granted.

ARGUMENT

1. Petitioner indisputably would have been eligible for Section 212(c) relief had his case originated in the Second Circuit. The government disparages that court as an "outlier" (Opp. 16)—a term hardly befitting

a circuit that in 2010 heard nearly one-fifth of all immigration cases. *See* Duff, *Judicial Business of the United States Courts: 2010 Annual Report of the Director*, tbl. B-3 (2011), *at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf. And the government does not defend the extreme reasoning of the Ninth Circuit, contending instead (Opp. 8) that the Ninth Circuit's position "essentially comports" with that of other circuits—a revisionist interpretation rejected by the courts involved. *E.g.*, *De la Rosa* v. *U.S. Att'y Gen.*, 579 F.3d 1327, 1337 n.14 (11th Cir. 2009) (Eleventh Circuit's refusal to follow "the route taken by the Ninth Circuit"); *Abebe* v. *Mukasey*, 554 F.3d 1203, 1211 (9th Cir. 2009) (en banc) (Clifton, J., concurring) (Ninth Circuit majority "create[d] a three-way circuit split").[1] Ultimately, it does not matter whether the circuits are split two ways or three; what matters is that outcomes differ by circuit.

The government does not dispute that the question presented has arisen in over 160 circuit and BIA cases since 2005 (Pet. App. 95a-105a)—a figure that does not include unreported decisions of immigration judges.[2]

---

[1] Contrary to the government's assertion, the Ninth Circuit has ruled, albeit inconsistently, that *Abebe* rendered deportable LPRs categorically ineligible for Section 212(c) relief (*Sito* v. *Holder*, 387 F. App'x 700 (9th Cir. 2010) (unpublished)), and the government itself has so argued. *E.g.*, Appellee's Br. 17, *United States* v. *Magana-Cancino*, 2010 WL 3950080 (9th Cir. Feb. 11, 2010) (arguing that petitioner "was facing deportation and not inadmissibility" and "did not have a right to" Section 212(c) relief (citing *Abebe*)). This is relevant not to show an "intra-circuit" split (Opp. 9 n.6), but to confirm that the Ninth Circuit's approach has differed from that of any other circuit.

[2] Additional cases have arisen since the petition was filed. *See, e.g.*, *De Nobrega* v. *U.S. Attorney General*, 2010 WL 5174955

Nor does a decline in Section 212(c) grants between 2004 and 2009 (Opp. 17) help the government, because that decline coincides with the BIA's 2005 decision in *Matter of Blake*, 23 I. & N. Dec. 722, *rev'd*, 489 F.3d 88 (2d Cir. 2007). It is hardly surprising that Section 212(c) grants dropped immediately after the BIA's unexpected "change in law," which eliminated Section 212(c) relief for hundreds of LPRs who previously were eligible for it. *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005), *appeal docketed*, No. 08-70736 (9th Cir. Feb. 22, 2008); Pet. 9-12 & nn.5-6.

The government's claim that Section 212(c) *applications* have decreased since 2004—a claim supposedly based on unidentified "published and unpublished statistics" (Opp. 18 & n.9)—is similarly unavailing. LPRs in circuits governed by *Blake* are less likely to apply for Section 212(c) relief or to be informed by counsel or an immigration judge that they may do so. Moreover, the government's statistics likely understate the frequency with which the issue arises, because Section 212(c) requests that, like Petitioner's, are "pretermitted" under *Blake* may not be recorded as "applications." Pet. App. 12a ("APPLICATIONS: None submitted; no eligibility established"), 18a-19a (no notation that Petitioner sought Section 212(c) relief). And even the government admits that 857 LPRs were granted Section 212(c) relief in 2010. Opp. 17. A form of relief that allows over 800 people to avoid removal each year is far from unimportant.

(11th Cir. Dec. 22, 2010) (unpublished); *Ramos-Ruiz* v. *Holder*, 2010 WL 5158569 (9th Cir. Dec. 15, 2010) (unpublished); *Castro* v. *Holder*, 2010 WL 4683882 (9th Cir. Nov. 19, 2010) (unpublished); *Matter of Paniagua Zavala*, 2011 WL 585614 (BIA Feb. 3, 2011).

Nor does Section 212(c)'s prospective repeal in 1996 reduce its importance as a present-day avenue for relief. For many LPRs who have lived here lawfully for decades, the issue only arises when they apply for naturalization. *E.g.*, *Lovan* v. *Holder*, 574 F.3d 990, 992 (8th Cir. 2009). Section 212(c) thus still affects hundreds if not thousands of people—a fact underscored by this Court's receipt of six other petitions raising this issue in 2009 and 2010. Opp. 7. This case, however, is an ideal vehicle: the issue has fully percolated; no Member of the Court is recused; and, unlike in *Ukofia* v. *Holder*, 131 S. Ct. 191 (2010) (No. 09-11395), Petitioner is represented by counsel.

The BIA has essentially undone this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), repealing Section 212(c) for any LPR outside the Second Circuit who is deportable for a non-drug aggravated felony—unless the LPR fortuitously left the United States and returned. That erroneous constriction of Section 212(c) implicates undeniably powerful interests: deportation "may result ... in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922); *see also Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1486 (2010) (describing "[t]he severity of deportation" as "the equivalent of banishment or exile" (internal quotation marks omitted)). Petitioner's removal would consign him to a country where he does not speak the language and has no employment prospects and would deprive his U.S. citizen family—including his elderly mother and his daughter—of his companionship and support. These circumstances warrant this Court's review.

2. The government's merits arguments depend on distorting both the law and Petitioner's position.

a. The government argues that the BIA's sudden about-face in 2005 was not retroactive. Opp. 15 n.7; *accord* Opp. 10. Yet the government identifies no pre-2005 case—not one—holding that an LPR who was deportable for a "crime of violence" or "sexual abuse of a minor" offense was ineligible for Section 212(c) relief. Petitioner, by contrast, identified many contrary examples, including cases in which relief was granted but then withdrawn after *Blake* changed the law. Pet. 9-12 nn.5-6.

The government cavils that BIA decisions granting relief were not "precedential" (Opp. 10-11), without explaining why that should matter. Consistent uniform decisions, published or not, indicate agency practice. *See Cruz* v. *Attorney General*, 452 F.3d 240, 246 & n.3 (3d Cir. 2006) (noting "routine[]" BIA practice based on "ten unpublished opinions" with no contrary decision). If anything, non-publication shows that the decisions were uncontroversial and did not involve the "alteration, modification, or clarification of an existing rule of law." BIA Practice Manual § 1.4(d)(i)(A) (rev. July 30, 2004). The "unbroken string of unpublished opinions" also "underline[s] the correctness" of similar reasoning in published decisions. *Perez-Enriquez* v. *Gonzales*, 463 F.3d 1007, 1013 (9th Cir. 2006) (en banc).[3]

---

[3] In 1992, the BIA held that an LPR convicted of attempted murder (a crime of violence) could apply for Section 212(c) relief, distinguishing firearms cases in which the LPR lacked "a comparable ground of excludability." *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 589-590. The BIA's remand "to afford the [LPR] an opportunity to apply for a [Section 212(c)] waiver" (*id.* at 591) would have been futile if all crimes of violence lacked statutory counterparts. And contrary to the government's claim (Opp. 11), the BIA in *Matter of A-A-*, 20 I. & N. Dec. 492 (1992), specifically

The BIA's approach before 2005 mirrors contemporaneous court of appeals decisions, none of which the government addresses. Pet. 10-11. Even the government itself, when opposing Section 212(c) relief for an LPR convicted of a crime of violence, did not argue that relief was unavailable due to lack of a statutory counterpart. Appellees' Br. 11-12, *Cordes* v. *Gonzales*, No. 04-15988 (9th Cir. Oct. 12, 2004). Such an argument, were it correct, would have easily resolved the case in the government's favor; instead, the LPR prevailed. *Cordes* v. *Gonzales*, 421 F.3d 889, 893, 898-899 (9th Cir. 2005), *vacated on other grounds sub nom. Cordes* v. *Mukasey*, 517 F.3d 1094 (9th Cir. 2008). And the government argued in 2002 that "Congress could rationally have decided to eliminate [Section 212(c)] relief altogether for all aliens convicted of ... crimes of violence"—a contention that only made sense because LPRs with "crime of violence" convictions *were* eligible for relief. Appellee's Br. *13, *United States* v. *Ubaldo-Figueroa*, 2002 WL 32254035 (9th Cir. Oct. 10, 2002). The government's advocacy was not inadvertent; it reflected the universal understanding before 2005 that "crime of violence" and "sexual abuse of a minor" offenses were waivable under Section 212(c). *See also* Pet. App. 38a (immigration judge acknowledging that Section 212(c) "could have been applied to [Petitioner's] manslaughter conviction").

---

addressed the statutory counterpart doctrine, finding that an LPR convicted of murder was "deportable under a deportation provision analogous to the exclusion ground at section 212(a)(9)" (crime involving moral turpitude) and was "therefore not disqualified from relief ... on this account." *Id.* at 500-501.

Given this uniform practice, the government's suggestion that Petitioner could "have easily avoided" removal "by departing the country voluntarily at any point before his removal proceedings were initiated in 2005" is incomprehensible. Opp. 17. Before 2005, no immigration lawyer, judge, or even government lawyer would have told Petitioner that his Section 212(c) eligibility depended on departing the country. For decades, the BIA and every circuit had agreed that deportable aliens need *not* depart, and the Solicitor General acquiesced in that view. Pet. 6-7 & n.2. The government's suggestion that Petitioner should have anticipated that the BIA would reverse course in 2005 is untenable.[4]

The government's assertion that the statutory counterpart test is "not new" (Opp. 17) is similarly misdirected. Before 2005, the BIA consistently held that LPRs like Petitioner *satisfied* the test because their offenses had a statutory counterpart, namely "crime involving moral turpitude" (CIMT). The two main deportation bases that categorically failed the test were "entry without inspection and firearms violations." Aleinikoff et al., *Immigration: Process & Policy* 703-704 (3d ed. 1995); *see also Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 282 n.4 (Att'y Gen. 1991).

The government weakly claims (Opp. 4) that "the analytical underpinnings of its interpretation" were found in *Komarenko* v. *INS*, 35 F.3d 432 (9th Cir. 1994), *abrogated by Abebe*, 554 F.3d 1203. The BIA did not think so; it treated LPRs deportable for "crime of vio-

---

[4] Equally untenable is the suggestion that Petitioner's presence was "'illegal.'" Opp. 18 (quoting *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 44 (2006)). Petitioner entered as and remained a lawful permanent resident. Pet. App. 37a.

lence" and "sexual abuse" offenses as eligible for Section 212(c) relief well after *Komarenko*, including in cases arising in the Ninth Circuit. *Matter of Orrosquieta*, 2003 WL 23508672 (BIA Dec. 19, 2003) (San Diego); *Cardona*, 2005 WL 3709244 (Seattle). The Ninth Circuit did too. *Cordes*, 421 F.3d at 893, 898-899.[5]

Try as the government might, it cannot rewrite history. Before 2005, deportable LPRs with the same conviction as Petitioner were eligible to seek Section 212(c) relief regardless of whether they had left the country and reentered. The BIA's later contrary ruling was an unjustified, retroactive, arbitrary and capricious "change in law."

b. As Petitioner demonstrated, the BIA's new position distinguishes between (1) *deportable* LPRs who traveled abroad, were readmitted, and subsequently were placed in *deportation* proceedings, and (2) LPRs *deportable* on the same charge who never departed. Pet. 24. The government admits as much when it suggests that Petitioner's eligibility for relief turned on departure (Opp. 17), yet it points to no rational basis for treating a deportable LPR who did *not* travel abroad less favorably than a deportable LPR who did. Pet. 26; *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976); *Matter of L-*, 1 I. & N. Dec. 1, 6 (Att'y Gen. 1940)

---

[5] *Komarenko* was an unremarkable application of the statutory counterpart rule to a firearms offense, namely assault with a deadly weapon under Cal. Penal Code § 245(a)(2), which is *not* an excludable CIMT. *Carr* v. *INS*, 86 F.3d 949, 951 (9th Cir. 1996). Even if Komarenko had departed, he could not have sought Section 212(c) relief. The opposite is true of Petitioner.

("To require [petitioner] to go to Canada and reenter will make him no better resident of this country.").[6]

Instead of addressing Petitioner's argument, the government attacks a strawman, claiming that Petitioner "essentially" contends that he should be treated like an LPR charged with "inadmissibility." Opp. 10. Petitioner made no such argument. Rather, the correct comparison is to a *deportable* LPR who had previously traveled abroad and whose offense of conviction qualifies as a CIMT. Pet. 19-20. Such persons are eligible for Section 212(c) relief in deportation under the longstanding *nunc pro tunc* procedure. Pet. 6-8; *see also De la Rosa*, 579 F.3d at 1338 (recognizing that an LPR who "is convicted of a deportable offense, travels abroad, returns to the United States, and then is placed in deportation proceedings" is eligible under Section 212(c)).

The government may well wish that Petitioner had challenged a distinction between persons who have "already been admitted to the country" and persons "seeking admission." Opp. 12. But that has never been Petitioner's argument. Rather, the inequality results from an irrational distinction among *deportable* LPRs, all of whom have "already been admitted to the country." As noted, the government does not even try to articulate a rational basis for distinguishing (especially

---

[6] The government contends (Opp. 11) that Congress's "enactment" of an "immigration provision" is constitutional if there is a "facially legitimate and bona fide reason" for it. Petitioner does not challenge any congressional "enactment," but an unconstitutional distinction created by a *BIA decision* that is inconsistent with the longstanding application of Section 212(c). Rational-basis review applies.

retroactively) between deportable LPRs based only on whether they previously departed the country.

The government acknowledges Petitioner's actual argument once, in a footnote (Opp. 16 n.8), and even then its response is off-point. Contrary to the government's insinuation, grants of relief *nunc pro tunc* to deportable LPRs who traveled abroad are far from extraordinary. They represent a "long-established administrative practice" reflected in numerous BIA decisions. *Matter of Arias-Uribe*, 13 I. & N. Dec. 696, 698 (BIA 1971), *aff'd*, 466 F.2d 1198 (9th Cir. 1972); *see also Matter of K-*, 9 I. & N. Dec. 585, 586 (BIA 1962); *Matter of G-A-*, 7 I. & N. Dec. 274, 276 (BIA 1956); *Matter of S-*, 6 I. & N. Dec. 392, 396 (BIA 1954); *Hernandez-Casillas*, 20 I. & N. Dec. at 284 n.6 (refusing to overrule *G-A-* and *S-*). The government cites no case in which a deportable LPR's case was held insufficiently "extraordinary" for Section 212(c) relief *nunc pro tunc*.[7]

The government's suggestion that an equal protection claim fails unless the LPR can identify an inadmissibility subsection that contains "similar language" and is "substantially identical" to his deportation subsection (Opp. 4, 14) is baseless. An equal protection challenge to an irrational governmental distinction (prior travel) that appears nowhere in the relevant statute (Section 212(c)) cannot be defeated by pointing to semantic variations in completely *different* statutory subsections (the inadmissibility provisions of Section 212(a) and the deportability provisions of Section 237). As the Second

---

[7] The government references Petitioner's 2003 theft conviction as bearing on the *merits* of a Section 212(c) application (Opp. 16 n.8), but does not dispute its irrelevance to the question presented, which concerns only his eligibility to *apply* for relief.

Circuit reasoned, the government's "emphasis on similar language is strange." *Blake* v. *Carbone*, 489 F.3d 88, 102 (2d Cir. 2007). Congress plainly did not draft Section 212(a) and Section 237 on the theory that discrepancies in their terminology would determine the availability of relief under Section 212(c).

Nor is it an answer that Petitioner is "not being treated any differently from other aliens" denied relief under *Blake* (Opp. 16), any more than discrimination against red-headed people could be defended by pointing out that all redheads were treated alike. The government "cannot deflect an equal protection challenge by observing that ... all those within the burdened class are similarly situated. The classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps." *Williams* v. *Vermont*, 472 U.S. 14, 27 (1985); *see also Rinaldi* v. *Yeager*, 384 U.S. 305, 308-309 (1966) (equal protection "imposes a requirement of some rationality in the nature of the class singled out").

The government cites the Ninth Circuit's now-abrogated decision in *Komarenko* as "persuasive." Opp. 12. The relative persuasiveness of the circuits' differing views is the very issue this Court should resolve on certiorari. For now, it suffices to note that Komarenko's offense was not held to be a CIMT and, accordingly, raised a different (and less compelling) equal protection issue, as the government recognizes. *Id.* (*Komarenko* considered whether "two groups of aliens *convicted of different crimes*" were similarly situated (emphasis added)). This case, by contrast, involves the BIA's sudden decision in 2005 to start treating deportable LPRs convicted of the *same crime* and deportable under the *same charge* differently depending on whether they previously left the country.

The Second Circuit addressed that very question and answered it correctly. It did not "vastly overstep" the judicial role or require consideration of "the facts" of particular cases (Opp. 13, 19); it simply required that the BIA decide the legal question whether a particular offense is a CIMT as well as an aggravated felony. *Blake* v. *Carbone*, 489 F.3d at 105. Federal courts, including this Court, routinely review such determinations. *E.g.*, *Jordan* v. *De George*, 341 U.S. 223, 223-224, 232 (1951) ("conspiracy to defraud the United States of taxes on distilled spirits" is a CIMT). Often, as here, the issue is not even disputed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
PAUL R. Q. WOLFSON
JAMES L. QUARLES III
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

MARK C. FLEMING
Counsel of Record
MEGAN BARBERO
ELIZABETH KENT CULLEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

MARCH 2011

PETITIONER'S BRIEF

No. 10-694

IN THE

Supreme Court of the United States

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

SETH P. WAXMAN
PAUL R.Q. WOLFSON
JAMES L. QUARLES, III
ERIC F. CITRON
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

MARK C. FLEMING
Counsel of Record
MEGAN BARBERO
ELIZABETH KENT CULLEN
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

QUESTION PRESENTED

Whether a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and excludable under differently phrased statutory subsections, and who did not depart and reenter the United States between the conviction and the commencement of removal proceedings, is categorically foreclosed from seeking discretionary relief from removal under former Section 212(c) of the Immigration and Nationality Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS 2

STATEMENT 2

A. The Agency Grants Discretionary Relief From Deportation Before Section 212(c) 4

B. Congress Enacts Section 212(c) Without Changing The Agency's Practice 6

C. The Agency Grants Section 212(c) Relief To LPRs Who Have *Not* Traveled Abroad, Provided They Are Deportable For A Conviction That Would Also Render Them Excludable 11

D. Congress Expressly Recognizes The Availability Of Section 212(c) Relief From Deportation 14

E. The BIA Recognizes That LPRs Deportable For "Aggravated Felony" Convictions, Including "Crimes Of Violence," Are Eligible For Relief 17

F. Agency Regulations "Codify" *St. Cyr*, Leaving Section 212(c) Eligibility Unchanged For LPRs Who Pled Guilty Before 1996 20

TABLE OF CONTENTS—Continued

Page

G. The BIA Retroactively Changes The Law 22

H. Proceedings Below 24

SUMMARY OF ARGUMENT 26

ARGUMENT 28

I. SECTION 212(C) RELIEF IS AVAILABLE IN DEPORTATION PROCEEDINGS 28

II. THE BIA'S NEW POLICY ANNOUNCED IN *BLAKE* AND *BRIEVA-PEREZ* IS ARBITRARY AND CAPRICIOUS 31

A. The BIA's Change In Law Was Impermissibly Retroactive 31

1. The BIA's *Blake* and *Brieva-Perez* decisions retroactively changed the law 32

2. There was no adequate reason for the BIA's retroactive change in law 38

B. *Blake* And *Brieva-Perez* Are Arbitrary And Capricious On Their Own Merits 44

C. The BIA's Distinction Based On Travel History Raises Serious Equal Protection Concerns 51

D. At A Minimum, The BIA Failed To Consider The Appropriate Factors Under The APA 53

CONCLUSION 55

TABLE OF CONTENTS—Continued

Page

APPENDIX

8 U.S.C.

§1101 ..... 1a
§1182 ..... 5a
§1182(c) (1988) 9a
§1182(c) (1994) 10a
§1182(c) (Apr. 24, 1996) 10a
§1227 ..... 11a

8 C.F.R.

§212.3 (1992) 14a
§1212.3 ..... 17a

Department of Homeland Security U.S. Citizenship and Immigration Services Form 1-191, Application for Advance Permission to Return to Unrelinquished Domicile (excerpts) 22a

Department of Homeland Security U.S. Citizenship and Immigration Services Instructions for Form 1-191, Application for Advance Permission to Return to Unrelinquished Domicile (excerpts) 24a

TABLE OF AUTHORITIES

CASES

Page(s)

Abebe v. *Mukasey*, 554 F.3d 1203, *full court reh'g denied*, 577 F.3d 1113 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010) ..... *passim*

Ablang v. *Reno*, 52 F.3d 801 (9th Cir. 1995) 52

ARA Services, Inc. v. *NLRB*, 71 F.3d 129 (4th Cir. 1995) 40

Arias-Uribe v. *INS*, 466 F.2d 1198 (9th Cir. 1972) 12

Azizi v. *Thornburgh*, 908 F.2d 1130 (2d Cir. 1990) 52

Blake v. *Carbone*, 489 F.3d 88 (2d Cir. 2007) 24

Boeing Co. v. *United States*, 537 U.S. 437 (2003) 31

Bowen v. *Georgetown University Hospital*, 488 U.S. 204 (1988) 40, 54

Breyer v. *Meissner*, 214 F.3d 416 (3d Cir. 2000) 52

Cabasug v. *INS*, 847 F.2d 1321 (9th Cir. 1988) 11, 22, 36, 52

Campos v. *INS*, 961 F.2d 309 (1st Cir. 1992) 14

Carachuri-Rosendo v. *Holder*, 130 S. Ct. 2577 (2010) 43, 47

Cato v. *INS*, 84 F.3d 597 (2d Cir. 1996) 14

Chevron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984) 44

Clark v. *Martinez*, 543 U.S. 371 (2005) 51

TABLE OF AUTHORITIES—Continued

Page(s)

De Araujo v. *Gonzales*, 457 F.3d 146 (1st Cir. 2006) 18

De la Rosa v. *United States Attorney General*, 579 F.3d 1327 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010) 23, 41

Drax v. *Reno*, 338 F.3d 98 (2d Cir. 2003) 14

Edelman v. *Lynchburg College*, 535 U.S. 106 (2002) 31

FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 53

Farquharson v. *United States Attorney General*, 246 F.3d 1317 (11th Cir. 2001) 14

Fiallo v. *Bell*, 430 U.S. 787 (1977) 52

Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976) ..... *passim*

Gjonaj v. *INS*, 47 F.3d 824 (6th Cir. 1995) 14

Heckler v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984) 38

Hem v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006) 18

INS v. *St. Cyr*, 533 U.S. 289 (2001) ..... *passim*

J.L. Foti Construction Co. v. *OSHA Review Commission*, 687 F.2d 853 (6th Cir. 1987) 40

James v. *Strange*, 407 U.S. 128 (1972) 52

Johnson v. *Whitehead*, 2011 WL 1998333 (4th Cir. May 24, 2011) 52

Judulang v. *Chertoff*, 535 F. Supp. 2d 1129 (S.D. Cal. 2008) 26

TABLE OF AUTHORITIES—Continued

Page(s)

Kim v. *Gonzales*, 468 F.3d 58 (1st Cir. 2006) 50

Komarenko v. *INS*, 35 F.3d 432 (9th Cir. 1994) 14

Laborers' International Union v. *Foster Wheeler Corp.*, 26 F.3d 375 (3d Cir. 1994) 40

Landgraf v. *USI Film Products*, 511 U.S. 244, 270 (1994) 17, 38

Leal-Rodriguez v. *INS*, 990 F.2d 939 (7th Cir. 1993) 14

Lehman v. *Burnley*, 866 F.2d 33 (2d Cir. 1989) 40

Lorillard v. *Pons*, 434 U.S. 575 (1978) 29

Mathews v. *Diaz*, 426 U.S. 67 (1976) 52

Matter of A-, 3 I. & N. Dec. 168 (BIA 1948) 6

Matter of A-A-, 20 I. & N. Dec. 492 (BIA 1992) 10, 18, 32

Matter of Arias-Uribe, 13 I. & N. Dec. 696 (BIA 1971) 11

Matter of Ashley, 2003 WL 23521830 (BIA Nov. 4, 2003) 19

Matter of Balderas, 20 I. & N. Dec. 389 (BIA 1991) 10, 47, 49

Matter of Banuelos-Delena, 2006 WL 901335 (BIA Mar. 2, 2006) 23

Matter of Blake, 23 I. & N. Dec. 722 (2005) ..... *passim*

Matter of Brieva-Perez, 23 I. & N. Dec. 766 (2005) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of Burbano, 20 I. & N. Dec. 872 (BIA 1994) 19

Matter of Cardona, 2005 WL 3709244 (BIA Dec. 27, 2005) 23, 32, 38, 53

Matter of Caro-Lozano, 2004 WL 1398661 (BIA Apr. 22, 2004) 18

Matter of Dimopoulos, 2011 WL 2261207 (BIA May 17, 2011) 54

Matter of Edwards, 10 I. & N. Dec. 506 (BIA 1963) 7

Matter of Esposito, 21 I. & N. Dec. 1 (BIA 1995) 14, 36, 37

Matter of F-, 6 I. & N. Dec. 537 (BIA 1955) 7

Matter of G-A-, 7 I. & N. Dec. 274 (BIA 1956) ..... *passim*

Matter of Gomez-Perez, 2006 WL 901334 (BIA Mar. 1, 2006) 23

Matter of Granados, 16 I. & N. Dec. 726 (BIA 1979) 13, 14, 22, 36

Matter of Hernandez-Casillas, 20 I. & N. Dec. 262 (Att'y Gen. 1991) 13, 14, 22, 33, 36

Matter of Hussein, 2004 WL 1059601 (BIA Mar. 15, 2004) 18, 19

Matter of Jimenez-Santillano, 21 I. & N. Dec. 567 (BIA 1996) 13, 34

Matter of K-, 9 I. & N. Dec. 585 (BIA 1962) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of L-, 1 I. & N. Dec. 1 (Att'y Gen. 1940) ..... *passim*

Matter of L-, 3 I. & N. Dec. 767 (BIA 1949) 6

Matter of Loney, 2004 WL 1167256 (BIA Feb. 10, 2004) 18

Matter of M-, 5 I. & N. Dec. 598 (BIA 1954) 7

Matter of Marin, 16 I. & N. Dec. 581 (BIA 1978) 44

Matter of Martinez, 2004 WL 1167082 (BIA Feb. 18, 2004) 18

Matter of Mascorro-Perales, 12 I. & N. Dec. 228 (BIA 1967) 8, 35, 49

Matter of Meza, 20 I. & N. Dec. 257 (BIA 1991) ..... *passim*

Matter of Montenegro, 20 I. & N. Dec. 603 (BIA 1992) 14, 19

Matter of Munoz, 28 Immigr. Rep. B1-1 (BIA Aug. 7, 2003) 18, 34

Matter of Orrosquieta, 2003 WL 23508672 (BIA Dec. 19, 2003) 18

Matter of Rangel-Zuazo, No. A90-640-428 (BIA May 25, 2005) 23

Matter of Reyes Manzueta, 2003 WL 23269892 (BIA Dec. 1, 2003) 18

Matter of Rodriguez-Cortes, 20 I. & N. Dec. 587 (BIA 1992) 18, 32

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of Rodriguez-Symonds, 2004 WL 880246 (BIA Mar. 9, 2004) 19

Matter of Rowe, No. 37-749-964 (BIA May 9, 2003) 19

Matter of S-, 6 I. & N. Dec. 392 (BIA 1954) 7, 29

Matter of S-Lei, No. A38-139-424 (BIA May 27, 2004) 18

Matter of Silva, 16 I. & N. Dec. 26 (BIA 1976) ..... *passim*

Matter of Smith, 11 I. & N. Dec. 325 (BIA 1965) 9

Matter of Tanori, 15 I. & N. Dec. 566 (BIA 1976) 7

Matter of Umer, 2010 WL 1606998 (BIA Mar. 31, 2010) 23

Matter of V-, 2 I. & N. Dec. 340 (BIA 1945) 6

Matter of V-I-, 3 I. & N. Dec. 571 (BIA 1949) 6

Matter of Wadud, 19 I. & N. Dec. 182 (BIA 1984) 14

Mayo Foundation for Medical Education & Research v. *United States*, 131 S. Ct. 704 (2011) 44

Microcomputer Technology Institute v. *Riley*, 139 F.3d 1044 (5th Cir. 1998) 40

Microsoft Corp. v. *i4i Ltd. Partnership*, 131 S. Ct. 2238 (2011) 31

Miguel-Miguel v. *Gonzales*, 500 F.3d 941 (9th Cir. 2007) 40

TABLE OF AUTHORITIES—Continued

Page(s)

Motor Vehicle Manufacturers Ass'n of United States, Inc. v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) 51, 55

Ng Fung Ho v. *White*, 259 U.S. 276 (1922) 42

NLRB v. *Bell Aerospace Co. Division of Textron, Inc.*, 416 U.S. 267 (1974) 29, 39

NLRB v. *Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966) 39, 41

NLRB v. *Wayne Transportation*, 776 F.2d 745 (7th Cir. 1985) 40

Padilla v. *Kentucky*, 130 S. Ct. 1473 (2010) 42

Paulo v. *Holder*, 2011 WL 1663572 (9th Cir. May 4, 2011) 33

Qwest Services Corp. v. *FCC*, 509 F.3d 531 (D.C. Cir. 2007) 44

Retail, Wholesale & Department Store Union v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972) 40

Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 52

Ryan Heating Co. v. *NLRB*, 942 F.2d 1287 (8th Cir. 1991) 40

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 25

SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 27, 39, 55

Society for Propagation of the Gospel v. *Wheeler*, 22 F. Cas. 756 (C.C.N.H. 1814) 38

Stewart Capital Corp. v. *Andrus*, 701 F.2d 846 (10th Cir. 1983) 40

TABLE OF AUTHORITIES—Continued

Page(s)

Toia v. *Fasano*, 334 F.3d 917 (9th Cir. 2003) 25

United States v. *Mead Corp.*, 533 U.S. 218 (2001) 44

United States v. *Ortega-Ascanio*, 376 F.3d 879 (9th Cir. 2004) 19

United States v. *Rutherford*, 442 U.S. 544 (1979) 31

United States v. *Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004) 18

Valere v. *Gonzales*, 473 F.3d 757 (7th Cir. 2007) 33

Vue v. *Gonzales*, 496 F.3d 858 (8th Cir. 2007) 33

Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001) 45

Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 52

DOCKETED CASES

Paulo v. *Holder*, No. 07-71198 (9th Cir.) 32

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND REGULATIONS

U.S. Const.
amend. V 2
amend. XIV 2

Administrative Procedure Act, 5 U.S.C. §706(2)(A) 44, 51

TABLE OF AUTHORITIES—Continued

Page(s)

Immigration and Nationality Act, 8 U.S.C.
§1101(a)(43) 37
§1101(a)(43)(A) 19
§1101(a)(43)(F) 17, 46
§1182(a) 4
§1182(a)(2)(A) 45
§1182(a)(2)(A)(i)(I) 13
§1182(a)(2)(C) 46
§1182(c) (1952) 6
§1182(c) (1994) 30
§1182(c) (Apr. 24, 1996) 30
§1227(a) 4
§1227(a)(2)(A)(iii) 15, 17, 34, 37
§1252b(e) (1991) 30
§1252b(e)(5) (1991) 14
§1432(a) (1988) 43

18 U.S.C. §16 ..... 17, 46

28 U.S.C. §1254(1) 2

Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 4

Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 ..... 6, 46

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 15

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 ..... 14, 15, 17

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ..... 16, 30

TABLE OF AUTHORITIES—Continued

Page(s)

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 16

8 C.F.R.
§212.3 9
§212.3(a) 10, 50
§212.3(d) 50
§212.3(e) 50
§212.3(e)(1) 10
§1212.3 29
§1212.3(a) 9, 10, 34, 50
§1212.3(b) 9
§1212.3(d) 10, 47, 50
§1212.3(e) 10, 34, 50
§1212.3(e)(1) 10
§1212.3(f)(4)(ii) 25
§1212.3(f)(5) 22, 54

23 Fed. Reg. 140 (Jan. 8, 1958) 9

30 Fed. Reg. 14,525 (Nov. 20, 1965) 9

56 Fed. Reg. 50,033 (Oct. 3, 1991) 14, 30

67 Fed. Reg. 52,627 (Aug. 13, 2002) 20

69 Fed. Reg. 57,826 (Sept. 28, 2004) 20, 21, 22

LEGISLATIVE MATERIALS

136 Cong. Rec.
S6586 (May 18, 1990) 15
S11,879 (Aug. 2, 1990) 15

139 Cong. Rec. E749 (Mar. 24, 1993) 15

140 Cong. Rec. S3068 (Mar. 16, 1994) 15

TABLE OF AUTHORITIES—Continued

Page(s)

141 Cong. Rec. H1586 (Feb. 10, 1995) 16

142 Cong. Rec. S4592 (May 2, 1996) 16

S. Rep. No. 81-1515 (1950) 7

S. Rep. No. 82-1137 (1952) 7

OTHER AUTHORITIES

Aleinikoff, Thomas Alexander, et al., *Immigration: Process and Policy* (3d ed. 1995) 13

BIA Practice Manual (rev. July 30, 2004), *available at* http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/tocfull.pdf 41

Breyer, Stephen G., et al., *Administrative Law and Regulatory Policy* (6th ed. 2006) 39

Comment on St. Cyr Rule No. 51 (Oct. 9, 2002) 22

Comment on St. Cyr Rule No. 55 (Oct. 11, 2002) 22

Gordon, Charles, et al., *Immigration Law and Procedure* (2011) 19

Hutchinson, E.P., *Legislative History of American Immigration Policy 1798-1965* (1981) 48

Pierce Jr., Richard J., *Administrative Law Treatise* (5th ed. 2010) 40

IN THE

Supreme Court of the United States

No. 10-694

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The court of appeals' decision is unpublished but available at 249 F. App'x 499. Pet. App. 1a-4a. The order denying rehearing and rehearing en banc is unreported. *Id.* 21a.

The decision of the Immigration Judge is unreported. Pet. App. 11a-20a. The decision of the Board of Immigration Appeals is unreported but available at 2006 WL 557842. Pet. App. 5a-9a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). The court of appeals' judgment was entered on September 17, 2007. Pet. App. 1a. Rehearing was denied on August 26, 2010. *Id.* 21a. The petition for certiorari was filed on November 24, 2010, and granted on April 18, 2011.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

1. The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law[.]"

2. The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State ... deny to any person within its jurisdiction the equal protection of the laws."

3. Section 212(c) of the Immigration and Nationality Act (INA) and other pertinent statutory and regulatory provisions are set forth in the appendix hereto. App. 1a-21a.

STATEMENT

For nearly a century, the immigration law has allowed the Attorney General to admit longstanding resident aliens to the United States notwithstanding convictions that would otherwise render them excludable. And for over 70 years, the Executive's implementation of those provisions has recognized that relief is available not only to those seeking admission to the country, but also to those seeking to avoid deportation. The availability of this relief from deportation—found

most recently in former INA Section 212(c)—is confirmed in decisions of the Attorney General and the Board of Immigration Appeals, agency regulations, and subsequent acts of Congress.

As this Court ruled in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), the availability of Section 212(c) relief from deportation has been critical to lawful permanent residents (LPRs) accused of crimes and considering guilty pleas because it often represents their best or only chance to remain in their longstanding homes. Accordingly, after Congress repealed Section 212(c) in 1996, this Court held that application of that repeal to those who pled guilty under the previous regime would create a severe retroactive effect. Absent evidence that Congress clearly intended such a disfavored measure, this Court held that Section 212(c) remained available to such LPRs.

Nevertheless, the BIA decided shortly thereafter to impose a similarly severe retroactive effect itself. As explained below, the BIA's decisions in *Matter of Blake*, 23 I. & N. Dec. 722 (2005), and *Matter of Brieva-Perez*, 23 I. & N. Dec. 766 (2005), adopted a novel, broad restriction on Section 212(c)'s availability in deportation proceedings, departing from established agency practices and regulations and rendering newly ineligible a broad class of LPRs who pled guilty prior to repeal. The BIA offered no justification for its new position and did not account for the reliance interests undermined by the retroactive effect it created. In fact, it did not even admit at the time that it had changed its policy, although it has since acknowledged that it did.

The new policy announced in *Blake* and *Brieva-Perez* cannot pass muster. It is impermissibly retroactive; it is arbitrary and capricious; it at least raises se-

rious constitutional questions (and, indeed, is unconstitutional); and it was unaccompanied by sufficient explanation. It should be reversed.

A. The Agency Grants Discretionary Relief From Deportation Before Section 212(c)

Section 3 of the Immigration Act of 1917, which excluded several classes of aliens from admission to the United States, contained the following "Seventh Proviso":

> [A]liens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe.

Pub. L. No. 64-301, §3, 39 Stat. 874, 878. "Although that provision applied literally only to exclusion proceedings, and although the deportation provisions of the statute did not contain a similar provision, the INS relied on [the Seventh Proviso] to grant relief in deportation proceedings involving aliens who had departed and returned to this country after the ground for deportation arose." *St. Cyr*, 533 U.S. at 294 (emphasis added).[1]

In 1940, then-Attorney General Robert H. Jackson extended Seventh Proviso relief to a deportable LPR in the first published immigration decision, *Matter of L-*, 1 I. & N. Dec. 1 (Att'y Gen. 1940). L- was a permanent resident who, in 1924, was convicted of larceny, a

---

[1] In 1996, Congress replaced deportation and exclusion proceedings with a single "removal" proceeding, but the statutory distinction between admissibility, 8 U.S.C. §1182(a), and deportability, *id.* §1227(a), remains.

"crime involving moral turpitude" (CIMT) that rendered him excludable. He later traveled to Yugoslavia and was readmitted without incident; months afterward, he was placed in deportation proceedings. *Id.* at 4.

L- applied for Seventh Proviso relief from deportation. Attorney General Jackson recognized that "[t]he seventh proviso ... appears in ... the exclusionary section of the act of 1917. In terms, it applies only to exclusion cases. No corresponding proviso appears in ... the deportation section." *L-*, 1 I. & N. Dec. at 5. But the Attorney General questioned "whether respondent is in a worse position because he was admitted without challenge in 1939, so that his appeal to discretion must be presented in deportation rather than in exclusion proceedings." *Id.* He continued:

> I cannot conclude that Congress intended the immigration laws to operate in so capricious and whimsical a fashion. Granted that respondent's departure in 1939 exposed him on return to the peril of a fresh judgment as to whether he should be permitted to reside in the United States, such judgment ought not to depend upon the technical form of the proceedings. No policy of Congress could possibly be served by such irrational result. ... [Respondent] should be permitted to make the same appeal to discretion that he could have made if denied admission in 1939, or that he could make in some future application for admission if he now left the country. To require him to go to Canada and reenter will make him no better resident of this country.

Id. at 5-6. Attorney General Jackson thus concluded that a "later, corrective exercise of the authority" to grant relief was proper and that "[s]uch action, *nunc pro tunc*, amounts to little more than a correction of a record of entry, which is a frequent and indispensable practice." *Id.* at 6.

Seventh Proviso relief was subsequently granted to other LPRs in deportation proceedings. *See, e.g.*, *Matter of L-*, 3 I. & N. Dec. 767, 768-769 (BIA 1949); *Matter of V-I-*, 3 I. & N. Dec. 571, 571-573 (BIA 1949); *Matter of A-*, 3 I. & N. Dec. 168, 172 (BIA 1948); *Matter of V-*, 2 I. & N. Dec. 340, 345 (BIA 1945).

B. Congress Enacts Section 212(c) Without Changing The Agency's Practice

In 1952, Congress enacted the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163. INA Section 212, relating to exclusion, contained a discretionary relief provision that tracked the Seventh Proviso:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General[.]

INA §212(c), 66 Stat. at 187, codified at 8 U.S.C. §1182(c).

Section 212(c), like the Seventh Proviso, referred only to LPRs seeking to be "admitted" and not to LPRs in deportation proceedings. But as the BIA soon recognized, Congress had conducted a "comprehensive study" of the Seventh Proviso before enacting Section

212, and "there is nothing to indicate that Congress wished to cut off this unique relief in deportation proceedings." *Matter of S-*, 6 I. & N. Dec. 392, 394-396 (BIA 1954); *see also* S. Rep. No. 81-1515, at 383 (1950) (reflecting awareness of *L-*). Indeed, although the Senate committee crafting Section 212(c) made several recommendations designed to limit relief, all of which were adopted, the committee never recommended limiting relief to exclusion proceedings. S. Rep. No. 81-1515, at 384; *see also* S. Rep. No. 82-1137, at 12 (1952).

Accordingly, the BIA repeatedly granted Section 212(c) relief to deportable aliens who had departed the country and reentered between their conviction and the commencement of deportation proceedings. As in *L-*, the BIA referred to this as "*nunc pro tunc*" relief from inadmissibility that also operated to relieve deportability. *E.g.*, *Matter of Tanori*, 15 I. & N. Dec. 566, 567-568 (BIA 1976); *Matter of K-*, 9 I. & N. Dec. 585, 586 (BIA 1962); *Matter of F-*, 6 I. & N. Dec. 537, 538 (BIA 1955); *Matter of M-*, 5 I. & N. Dec. 598, 600 (BIA 1954); *see also Matter of Edwards*, 10 I. & N. Dec. 506, 509-511 (BIA 1963); *Matter of G-A-*, 7 I. & N. Dec. 274, 276 (BIA 1956). This relief was granted as a matter of course to LPRs in deportation proceedings who would have been eligible had they been excluded upon entry. *See Matter of Silva*, 16 I. & N. Dec. 26, 27 (BIA 1976) ("We have consistently held that a waiver of the ground of inadmissibility under section 212(c) of the Act may be granted nunc pro tunc in deportation proceedings.").

Importantly, the BIA held that a Section 212(c) waiver of inadmissibility based on a criminal conviction was not limited to waiving exclusion, but also provided relief from deportation based on the same conviction. As the BIA stated in 1954, if Section 212(c) "is exercised to waive a ground of inadmissibility based upon a

criminal conviction, a deportation proceeding cannot thereafter be properly instituted *based upon the same criminal conviction*." *G-A-*, 7 I. & N. Dec. at 275 (emphasis added). This doctrine is "an implementation of the waiver provision, necessary to make it an effective remedy," *Matter of Mascorro-Perales*, 12 I. & N. Dec. 228, 230 (BIA 1967): it avoids the absurd result that an LPR could be admitted based on a Section 212(c) waiver of a conviction but then immediately deported based on the same conviction. *See G-A-*, 7 I. & N. Dec. at 275-276 ("[W]hen relief has been granted in accordance with the authorization of Congress, it would be clearly repugnant to say that the respondent remains deportable because of the same conviction.").

Section 212(c) has thus long been applied to grant "admi[ssion] with freedom from deportation," without regard to the forum in which relief is sought. *G-A-*, 7 I. & N. Dec. at 276 (quotation marks omitted); *see also Silva*, 16 I. & N. Dec. at 27-28 ("[W]e have interpreted section 212(c) of the Act to mean that a waiver of the ground of inadmissibility may be granted in a deportation proceeding when, at the time of the alien's last entry, he was inadmissible because of the same facts which form the basis of his deportability."); *Mascorro-Perales*, 12 I. & N. Dec. at 230 (describing *G-A-* as holding that "if a single act can be the basis of both excludability and deportability, and excludability is waived by the Attorney General, then that act, without more, cannot be the basis of a deportation charge").

Agency regulations codified this approach to Section 212(c), particularly its availability outside of exclusion proceedings. In 1958, the agency promulgated a regulation providing that "[a]n application for the exercise of discretion under section 212(c) of the act shall be submitted on Form I-191 to the district director ...

prior to, at the time of, or *at any time subsequent to the applicant's arrival.*" 23 Fed. Reg. 140, 141 (Jan. 8, 1958) (creating 8 C.F.R. §212.3) (emphases added). The regulation further provided that if the district director denied the request, "the denial shall be without prejudice to renewal of the application in the course of" later exclusion or deportation proceedings. *Id.*; *see also Matter of Smith*, 11 I. & N. Dec. 325, 327 (BIA 1965) (1958 regulation allowed "an application for relief under section 212(c) to be adjudicated in a deportation proceeding").

In 1965, the agency further clarified that a Section 212(c) application "may be submitted by the applicant to a special inquiry officer [now immigration judge] in the course of proceedings before him under sections 235, 236, and 242 of the Act and this chapter [*i.e.*, exclusion and deportation proceedings], ... regardless of whether the applicant has made such application previously to the district director." 30 Fed. Reg. 14,525, 14,526 (Nov. 20, 1965). Thus, by 1965, agency regulations expressly provided that Section 212(c) relief could be sought for the first time in deportation proceedings.

The regulations in force today continue to provide that a Section 212(c) waiver of inadmissibility may be sought outside of exclusion proceedings and, if granted, operates to waive deportation based on the same conviction. Section 212(c) applications are still made using Form I-191, entitled "Application for Advance Permission to Return to Unrelinquished Domicile." App. 22a-23a; 8 C.F.R. §1212.3(a) ("An application by an eligible alien for the exercise of discretion under former section 212(c) ... shall be submitted to the immigration judge by filing Form I–191[.]"). Form I-191 can be filed with an immigration district director even before proceedings begin. 8 C.F.R. §1212.3(b); App. 25a (instructing

filing of Form I-191 with immigration service center). Form I-191 can also be submitted to an IJ for the first time in an exclusion or deportation proceeding. *See* 8 C.F.R. §1212.3(a), (e).

Regardless of the forum, applicants seeking Section 212(c) relief must state: "I believe I may be inadmissible to the United States for the following reasons." App. 23a. The agency specifically instructs that, "if the application is made because you may be inadmissible due to a conviction of a crime, state in the application the designation of the crime, the date and place of its commission and of the conviction therefor[], and the sentence or other judgment of the court." App. 24a. The regulations provide that Section 212(c) relief is "valid indefinitely" as to the "specific grounds of excludability, deportability, or removability that were described in the application." 8 C.F.R. §1212.3(d). This provision "reflect[s] [the agency's] concern that a waiver, once granted, should remain valid indefinitely for all proceedings, including *both deportation and exclusion proceedings*." *Matter of Balderas*, 20 I. & N. Dec. 389, 393 (BIA 1991) (emphasis added). The regulations also make plain that the waiver sought for the first time in a deportation proceeding is the same ("[s]uch application") as the waiver sought in advance from the district director or in exclusion proceedings. 8 C.F.R. §§212.3(a), (e)(1), 1212.3(e)(1); *see also Matter of A-A-*, 20 I. & N. Dec. 492, 502 n.22 (BIA 1992) ("[A]n application for section 212(c) relief filed in the context of deportation proceedings is equivalent to one made at the time an alien physically seeks admission into the United States.").

Thus, under longstanding regulations still in force today, an LPR is eligible for Section 212(c) relief if his or her conviction could have been waived by the grant

of an Application for Advance Permission to Return submitted on Form I-191. And to state a valid basis for relief on Form I-191, the LPR—in addition to meeting the residency requirements—need only have a conviction that could be a waivable "reason[]" why he or she is "inadmissible to the United States." App. 23a.

C. The Agency Grants Section 212(c) Relief To LPRs Who Have *Not* Traveled Abroad, Provided They Are Deportable For A Conviction That Would Also Render Them Excludable

Initially, the BIA took the position that only LPRs who had actually departed and reentered after an excludable criminal conviction—and could therefore ask for *nunc pro tunc* relief—could seek a Section 212(c) waiver in deportation proceedings. As a result, identically situated LPRs who had *not* traveled abroad were treated as ineligible for relief. *E.g.*, *Matter of Arias-Uribe*, 13 I. & N. Dec. 696, 698 (BIA 1971).

In 1976, the Second Circuit ruled that deportable LPRs who had not traveled abroad and deportable LPRs who had were "in like circumstances, but for irrelevant and fortuitous factors," and that equal protection thus required that they be "treated in a like manner." *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976). As the court put it, "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time." *Id.*; *see also Cabasug* v. *INS*, 847 F.2d 1321, 1327 (9th Cir. 1988) (Wallace, J., concurring) (it would violate equal protection "to distinguish between aliens who had committed the same crime on the basis of whether they traveled abroad").

Although the Second Circuit's decision in *Francis* created a split with the Ninth Circuit, *see Arias-Uribe* v. *INS*, 466 F.2d 1198 (9th Cir. 1972) (per curiam), the Solicitor General decided not to seek certiorari. *Silva*, 16 I. & N. Dec. at 29-30. The BIA then adopted, nationwide, the "position that no distinction shall be made between permanent resident aliens who temporarily proceed abroad and non-departing permanent resident aliens." *Id.* at 30; *see also St. Cyr*, 533 U.S. at 295. All regional circuits approved that interpretation. *See* Pet. 7 n.2 (citing cases).

Although *Silva* eliminated distinctions based on travel history, it did not make Section 212(c) available to all deportable LPRs. Rather, it simply ruled that three categories of Section 212(c) applicants would be treated identically: (1) LPRs with excludable convictions who sought relief in exclusion proceedings or in advance from the district director; (2) LPRs with similar convictions who left the country, reentered, and sought relief *nunc pro tunc* in deportation proceedings (*e.g.*, *L-*, *G-A-*); and (3) LPRs with similar convictions who did *not* leave the country and sought relief in deportation proceedings (*Francis*, *Silva*). The eligibility predicate for all three categories was that the LPRs have a conviction that rendered them *excludable* under the INA's exclusion provision, Section 212(a). In other words, if a conviction rendered an LPR deportable, relief under Section 212(c) was available only if that same conviction would also have triggered inadmissibility.

This limitation on Section 212(c) eligibility came to be known as the "statutory counterpart" rule: relief was only available in deportation proceedings if the LPR was deportable for a conviction that fell under a "counterpart" exclusion provision that was waivable, not if the LPR was deportable for a reason that did not

render him or her excludable. In the first application of the rule, the BIA held that an LPR convicted of possession of a sawed-off shotgun was ineligible for relief because "[c]onviction for possession of a concealed sawed-off shotgun is not a specified section 212(a) ground of excludability, nor a crime involving moral turpitude that would render the respondent excludable under section 212(a)(9) of the Act." *Matter of Granados*, 16 I. & N. Dec. 726, 728 (BIA 1979).

This limitation is consistent with the regulatory scheme under which all applicants for Section 212(c) relief—even those petitioning for the first time in deportation proceedings—file the same Form I-191, requiring them to state a reason why they are "inadmissible to the United States." App. 23a; *see also Matter of Jimenez-Santillano*, 21 I. & N. Dec. 567, 575 (BIA 1996) (Section 212(c) relief is not available "to an alien in deportation proceedings when that same alien would not have occasion to seek such relief were he in exclusion proceedings instead").

Importantly, the set of deportable LPRs who lacked a "statutory counterpart" was limited because most crimes that trigger deportability also trigger inadmissibility, usually as a "crime involving moral turpitude." 8 U.S.C. §1182(a)(2)(A)(i)(I). Attorney General Richard L. Thornburgh stated as much in 1991, identifying only "two grounds for deportation [that] have no analogue in the grounds for exclusion," namely entry without inspection and firearms convictions. *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 282 n.4 (Att'y Gen. 1991); *see also* Aleinikoff et al., *Immigration: Process and Policy* 703-704 (3d ed. 1995) ("The two most significant deportation grounds without comparable exclusion grounds are entry without inspection and firearms violations."). Accordingly, only LPRs deport-

able for such offenses were deemed categorically ineligible for Section 212(c) relief.[2]

D. Congress Expressly Recognizes The Availability Of Section 212(c) Relief From Deportation

Although Congress has considered and enacted various restrictions on Section 212(c), it has never disapproved the availability of such relief in deportation proceedings regardless of travel history.

In 1990, Congress provided that aliens in deportation proceedings who "fail[ed] to appear" at certain hearings or as otherwise required were not entitled to "relief under section 212(c)." Immigration Act of 1990, Pub. L. No. 101-649, §545, 104 Stat. 4978, 5064-5065 (creating 8 U.S.C. §1252b(e)(5) (1991)). As the agency explained shortly thereafter, Congress's addition of that provision "explicitly recognized the applicability of section 212(c) relief to deportation proceedings." 56 Fed. Reg. 50,033, 50,033 (Oct. 3, 1991). At the same time, Congress rendered Section 212(c) inapplicable to "an alien who has been convicted of an aggravated fel-

---

[2] For firearms offenses, see *Drax* v. *Reno*, 338 F.3d 98, 101, 108-109 (2d Cir. 2003); *Cato* v. *INS*, 84 F.3d 597, 600 (2d Cir. 1996); *Gjonaj* v. *INS*, 47 F.3d 824, 825, 827 (6th Cir. 1995); *Komarenko* v. *INS*, 35 F.3d 432, 434-435 (9th Cir. 1994); *Campos* v. *INS*, 961 F.2d 309, 312-314 (1st Cir. 1992); *Matter of Esposito*, 21 I. & N. Dec. 1, 10 (BIA 1995); *Matter of Montenegro*, 20 I. & N. Dec. 603, 605-606 (BIA 1992); *Granados*, 16 I. & N. Dec. at 728-729. For entry without inspection, see *Farquharson* v. *U.S. Att'y Gen.*, 246 F.3d 1317, 1325 (11th Cir. 2001); *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 948, 952 (7th Cir. 1993); *Hernandez-Casillas*, 20 I. & N. Dec. at 281, 287-288; *see also Matter of Wadud*, 19 I. & N. Dec. 182, 185 (BIA 1984) (aiding and abetting fraudulent procurement of a visa).

ony and has served a term of imprisonment of at least 5 years." Immigration Act of 1990, §511, 104 Stat. at 5052. That amendment presupposed that Section 212(c) relief was available to LPRs in deportation proceedings, since "convicted of an aggravated felony" is a basis for deportation only, not inadmissibility. *See* 8 U.S.C. §1227(a)(2)(A)(iii) (added by Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §7344, 102 Stat. 4181, 4470-4471); *Matter of Meza*, 20 I. & N. Dec. 257, 261 (BIA 1991) (Heilman, Board Member, concurring) (relief is "available to aggravated felons in deportation proceedings under the 1990 amendment to section 212(c) of the Act").

The legislative record of the 1990 Act likewise reflects awareness of the agency's grant of Section 212(c) relief in deportation proceedings. *See* 136 Cong. Rec. S6586, S6604 (May 18, 1990) (Senator Dole) ("Section 212(c) provides relief from exclusion, and *by court decision from deportation* .... This discretionary relief is obtained by numerous excludable and deportable aliens[.]" (emphasis added)); *id.* S11,879, S11,942 (Aug. 2, 1990) (Senator D'Amato) ("[C]riminal aliens can seek a *waiver of deportation* if they can show 7 years of unrelinquished domicile in the United States under section 212(c)." (emphasis added)).[3]

---

[3] Subsequent congressional statements reflect this same understanding. *See* 139 Cong. Rec. E749 (Mar. 24, 1993) (Senator McCollum) (introducing a bill providing that "the only aggravated felon aliens *who could avoid deportation* would be those who have been permanent resident aliens for at least 7 years and who were sentenced to less than 5 years imprisonment" (emphasis added)); 140 Cong. Rec. S3068, S3071 (Mar. 16, 1994) (Senator Roth) ("Under section 212(c) ... a criminal alien who has been a permanent resident in the U.S. for seven years and has not served over 5

In 1996, Congress further limited the situations in which Section 212(c) relief was available to an alien who "*is deportable* by reason of having committed" certain enumerated offenses, including aggravated felonies. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §440(d)(2), 110 Stat. 1214, 1277 (AEDPA) (emphasis added). This once again suggested that the provision of Section 212(c) relief to *other* deportable aliens was consistent with congressional intent. *Cf.* 142 Cong. Rec. S4592, S4599 (May 2, 1996) (Senator Abraham) (noting that, even after AEDPA, some deportable aliens "will still be able to ... request 212(c) relief from the order of deportation").

Congress later repealed Section 212(c) as part of comprehensive changes to the immigration law. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §304(b), 110 Stat. 3009-546, 3009-597 (IIRIRA). But in *St. Cyr*, this Court ruled that, consistent with the presumption against retroactive legislation, the 1996 repeal was prospective only, such that Section 212(c) remained available to otherwise-eligible LPRs who were convicted by guilty plea of a waivable offense before repeal. 533 U.S. at 326. This Court ruled that, in light of the expectations surrounding those guilty pleas, "it would surely be contrary to 'familiar considerations of fair notice, reasonable reliance, and settled expectations,' to hold that ...

---

years for a felony offense may be granted relief from deportation."); 141 Cong. Rec. H1586, H1589 (Feb. 10, 1995) (Representative Conyers) ("H.R. 668 would amend the [INA] to extend a restriction that exists on the Attorney General's discretion to provide relief from deportation—under INA section 212(c)—for lawful permanent residents who have committed an 'aggravated' felony.").

subsequent restrictions deprive them of any possibility of [Section 212(c)] relief." *Id.* at 323-324 (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)).

E. The BIA Recognizes That LPRs Deportable For "Aggravated Felony" Convictions, Including "Crimes Of Violence," Are Eligible For Relief

After first providing in 1988 that LPRs convicted of an "aggravated felony" were deportable, Congress significantly broadened the set of convictions that qualified as aggravated felonies. *See St. Cyr*, 533 U.S. at 295 & n.4. Of particular relevance here, the 1990 Act added convictions for a "crime of violence (as defined in section 16 of Title 18, ... [but] not including a purely political offense)." Immigration Act of 1990, §501, 104 Stat. at 5048 (codified at 8 U.S.C. §1101(a)(43)(F)). Nothing in the 1990 Act suggested, however, that LPRs deportable for a "crime of violence" conviction would be categorically ineligible for Section 212(c) relief.

Indeed, the BIA soon confirmed that aggravated felons were not categorically disqualified from relief under the "statutory counterpart" analysis simply because they were charged under a deportation subsection that used different terminology from any exclusion subsection. In 1991, the BIA held that "waiver under section 212(c) is not unavailable to an alien convicted of an aggravated felony simply because there is no ground of exclusion which recites the words, 'convicted of an aggravated felony,' as in [8 U.S.C. §1227(a)(2)(A)(iii))]." *Meza*, 20 I. & N. Dec. at 259. Because most (perhaps all) offenses that rendered LPRs deportable for "crimes of violence" also rendered them excludable for CIMTs, numerous judicial and BIA decisions—both before and

after *St. Cyr*—found LPRs deportable for crimes of violence eligible for Section 212(c) relief; often, these decisions specifically noted that the LPRs satisfied the statutory counterpart requirement. *See, e.g.*, *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 590-591 (BIA 1992) (LPR convicted of attempted murder "is not barred from applying for section 212(c) relief"); *A-A-*, 20 I. & N. Dec. at 500-501 & n.19 (LPR convicted of murder, an aggravated felony, was deportable under a provision "analogous" to the exclusion provision for CIMT, so LPR was "not disqualified from relief under section 212(c)" for that reason); *see also Hem* v. *Maurer*, 458 F.3d 1185, 1187-1189 (10th Cir. 2006) (crime of violence); *De Araujo* v. *Gonzales*, 457 F.3d 146, 154-155 (1st Cir. 2006) (crime of violence); *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042, 1050-51 (9th Cir. 2004) (burglary).[4] After 1996, when Congress ex-

---

[4] *See Matter of S-Lei*, No. A38-139-424 (BIA May 27, 2004) (Pet. App. 57a-58a) (affirming Section 212(c) relief for LPR convicted of attempted robbery, a crime of violence); *Matter of Reyes Manzueta*, 2003 WL 23269892 (BIA Dec. 1, 2003) (affirming Section 212(c) waiver of voluntary manslaughter conviction, a crime of violence); *see also Matter of Caro-Lozano*, 2004 WL 1398661 (BIA Apr. 22, 2004) (reaching merits of Section 212(c) application in crime of violence case); *Matter of Hussein*, 2004 WL 1059601 (BIA Mar. 15, 2004) (remanding for consideration of Section 212(c) relief where conviction was for crime of violence); *Matter of Martinez*, 2004 WL 1167082 (BIA Feb. 18, 2004) ("[I]t does appear that section 212(c) could waive the burglary offense."); *Matter of Loney*, 2004 WL 1167256 (BIA Feb. 10, 2004) (LPR convicted of crime of violence was "not precluded" from seeking Section 212(c) relief where conviction was also CIMT); *Matter of Orrosquieta*, 2003 WL 23508672 (BIA Dec. 19, 2003) (recognizing that petitioner deportable for extortion, a crime of violence, would be "entitled" to seek Section 212(c) relief); *Matter of Munoz*, 28 Immigr. Rep. B1-1 (BIA Aug. 7, 2003) (Pet. App. 45a-55a) (remanding for consideration of Section 212(c) relief where crime of violence was also CIMT);

panded the aggravated felony definition to include "sexual abuse of a minor," 8 U.S.C. §1101(a)(43)(A), the BIA similarly allowed LPRs convicted of such crimes to seek Section 212(c) relief, provided the crime of conviction was waivable in exclusion proceedings.[5]

Of course, Section 212(c) relief remained discretionary; if the crime was very serious, the applicant—though eligible—was unlikely to receive relief. *See, e.g., Matter of Burbano*, 20 I. & N. Dec. 872, 878 (BIA 1994) ("[I]f an individual has been convicted of a particularly heinous murder, that fact in itself may be dispositive of the discretionary issue."). Nonetheless, even LPRs convicted of such serious crimes were *eligible*. *See Matter of Montenegro*, 20 I. & N. Dec. 603, 610 (BIA 1992) (Heilman, Board Member, concurring) ("If [applicant] had been found guilty of murder or manslaughter alone, he would be eligible for a section 212(c) waiver."); 6 Gordon et al., *Immigration Law and Procedure* §74.04[1][a], [2][g] (2011) (murder and rape convictions can be waived, though a heightened showing of worthiness is required).

Matter of Rowe, No. 37-749-964 (BIA May 9, 2003) (Pet. App. 41a-44a) (rejecting government's argument that crime of violence was unwaivable).

[5] *See, e.g., Hussein*, 2004 WL 1059601 (LPR convicted of indecency with a child was eligible for Section 212(c) relief because he could have been excluded for CIMT conviction); *Matter of Rodriguez-Symonds*, 2004 WL 880246 (BIA Mar. 9, 2004) (remanding for consideration of whether LPR's conviction for lewd act upon child was CIMT and therefore eligible for relief); *Matter of Ashley*, 2003 WL 23521830 (BIA Nov. 4, 2003) (noting apparent Section 212(c) eligibility for LPR convicted of sexual offense against a child); *see also United States* v. *Ortega-Ascanio*, 376 F.3d 879, 886-887 (9th Cir. 2004) (sexual battery).

F. Agency Regulations "Codify" *St. Cyr*, Leaving Section 212(c) Eligibility Unchanged For LPRs Who Pled Guilty Before 1996

Shortly after this Court's decision in *St. Cyr*, the Department of Justice proposed a rule that "would codify the Supreme Court's holding" and "consolidate[] the Department's interpretation of the availability of the section 212(c) waiver for LPRs in light of this litigation." 67 Fed. Reg. 52,627, 52,627-52,628 (Aug. 13, 2002). In the Supplementary Information accompanying the rule, the government acknowledged that Section 212(c) "applied to exclusion and deportation proceedings." *Id.* at 52,628; *see also id.* at 52,630 ("An eligible alien who is the subject of a pending deportation or removal proceeding before an Immigration Judge should file a section 212(c) application pursuant to this rule[.]").

Although the proposed rule did not expressly reference the statutory counterpart requirement, the agency's explanation indicated that it would apply as before. *See* 67 Fed. Reg. at 52,628-52,629 (requiring applicant to be "deportable or removable on a ground that has a corresponding ground of exclusion or inadmissibility"). The government nowhere stated that it intended to alter the statutory counterpart requirement to disqualify applicants who pled guilty to "crime of violence" aggravated felonies.

After receiving 60 comments, the agency issued a final rule in 2004. *See* 69 Fed. Reg. 57,826, 57,827 (Sept. 28, 2004). It explained that the final rule "adopts the proposed rule without substantial change" and reiterated that it "described procedures implementing the Supreme Court's decision." *Id.* at 57,826. The agency also "reiterate[d] and adopt[ed] the Supplementary In-

formation in the proposed rule ... as explaining the final rule." *Id.* at 52,827.

With respect to the statutory counterpart requirement, the agency noted:

> One commenter stated that the proposed rule should clarify that an alien charged and found deportable as an aggravated felon is not eligible for section 212(c) relief "if there is no comparable ground of admissibility for the specific category of aggravated felony charged." The commenter continues, "[f]or example, the rule should not apply to aggravated felons charged with deportability under specific types or categories of aggravated felonies such as 'Murder, Rape, or Sexual Abuse of a Minor' or 'Crime of Violence' aggravated felonies."

69 Fed. Reg. at 57,831. The quoted "commenter" language appears in two nearly identical letters that Petitioner obtained by FOIA request. The letters cite no authority for the assertion quoted above, nor do they address the BIA's prior statements and practice (*supra* pp. 17-19 & nn.4-5) finding LPRs convicted of aggravated felonies eligible for Section 212(c) relief. *See* Comment on *St. Cyr* Rule No. 51 at 1 (Oct. 9, 2002); *see also* Comment on *St. Cyr* Rule No. 55 at 1 (Oct. 11, 2002).[6]

In response, the agency agreed that the rule "should clarify" that the statutory counterpart test remained applicable and added a subsection to that effect.

---

[6] The commenters served as assistant district counsel for the Department of Homeland Security; at least one was active in litigating Section 212(c) cases.

See 69 Fed. Reg. at 57,831-57,832; 8 C.F.R. §1212.3(f)(5). In so doing, however, the agency indicated no intention to alter the established scope of the statutory counterpart requirement, nor did it embrace the commenters' assertion that "'Murder, Rape, or Sexual Abuse of a Minor' or 'Crime of Violence' aggravated felonies" lacked statutory counterparts. On the contrary, every authority cited involved firearms convictions or illegal entry, which had long been ineligible for Section 212(c) relief. *See* 69 Fed. Reg. at 57,831-57,832 (citing *Granados*, *Cabasug*, and *Hernandez-Casillas*).

G. The BIA Retroactively Changes The Law

In 2005, the BIA abruptly changed course. In *Blake*, 23 I. & N. Dec. at 722, an IJ granted Section 212(c) relief under *St. Cyr* to an LPR deportable for an aggravated felony conviction that constituted "sexual abuse of a minor." The BIA reversed, ruling for the first time that "whether a ground of deportation or removal has a statutory counterpart in the provisions for exclusion or inadmissibility turns on whether Congress has employed *similar language to describe substantially equivalent categories of offenses.*" *Id.* at 728 (emphasis added). The BIA barred the LPR in *Blake* from applying for relief because the words "sexual abuse of a minor" do not appear in any inadmissibility provision; it distinguished drug-related aggravated felonies, such as those at issue in *St. Cyr* and *Meza*, because "the language used in describing the drug-related aggravated felony provision covered substantially the same category of drug-related offenses addressed in the exclusion ground." *Id.* at 729.

Although it purported to rely on prior decisions "and the newly promulgated regulatory provision,"

23 I. & N. Dec. at 724, the BIA offered no explanation why a disparity in language between the deportation and exclusion provisions should determine Section 212(c) eligibility. Nor did it acknowledge its numerous decisions granting relief to other applicants with "sexual abuse" convictions. *See supra* pp. 18-19 & n.5. The BIA later applied the same reasoning to LPRs deportable for "crime of violence" convictions, *Brieva-Perez*, 23 I. & N. Dec. at 766—again without addressing the numerous indistinguishable cases in which Section 212(c) relief had been granted. *See supra* pp. 17-18 & n.4.

Only later did the BIA acknowledge that *Blake* and *Brieva-Perez* represented a sea change in its Section 212(c) jurisprudence—a fact confirmed by its reversal of decisions to grant relief under the prior approach. In one case, the BIA itself had affirmed an IJ's decision granting relief, but then vacated its decision on the government's motion, referring to *Blake* as "a *change in law* that appears to preclude a grant of 212(c) relief." *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005) (per curiam) (emphasis added). Numerous other BIA decisions recognized the novelty of *Blake*.[7]

---

[7] *See Matter of Gomez-Perez*, 2006 WL 901334 (BIA Mar. 1, 2006) (vacating IJ's decision to grant Section 212(c) waiver because LPR is "no longer eligible for relief"); *Matter of Rangel-Zuazo*, No. A90-640-428 (BIA May 25, 2005) (Pet. App. 59a-61a) (reversing IJ's decision to grant relief because "intervening precedent renders the respondent statutorily ineligible for section 212(c) relief"); *Matter of Banuelos-Delena*, 2006 WL 901335 (BIA Mar. 2, 2006) (reversing grant of Section 212(c) relief, citing "intervening Board precedent"); *Matter of Umer*, 2010 WL 1606998 (BIA Mar. 31, 2010) (referring to rule "announced in" *Brieva-Perez*); *cf. De la Rosa* v. *U.S. Att'y Gen.*, 579 F.3d 1327, 1332 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010) (calling *Blake* a "watershed moment in [Section] 212(c) jurisprudence").

The Second Circuit rejected *Blake*'s "emphasis on similar language" as "strange," noting that Congress "never contemplated that its grounds of deportation would have any connection with the grounds of exclusion," much less determine the availability of Section 212(c) relief. *Blake* v. *Carbone*, 489 F.3d 88, 102 (2d Cir. 2007). Rather, Section 212(c) eligibility turned on whether an LPR's "particular aggravated felony offense could form the basis of exclusion," not "the language Congress used to classify his or her status." *Id.* at 104.

Most other circuits accepted the BIA's position in *Blake*. The Ninth Circuit took an approach that neither the BIA nor the government endorsed: contrary to longstanding agency and judicial precedent, it ruled that Section 212(c) did not apply in deportation proceedings at all. *Abebe* v. *Mukasey*, 554 F.3d 1203 (en banc) (per curiam), *full court reh'g denied*, 577 F.3d 1113 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010).

H. Proceedings Below

Petitioner Joel Judulang, a native of the Philippines, entered the United States in 1974 at age eight. He has continuously resided in this country for 36 years.

Petitioner's grandfather served in the U.S. military in the Philippines between 1923 and 1948 (Pet. App. 29a-30a) and became a U.S. citizen as a result. Petitioner's parents both naturalized as well. *Id.* 36a-37a. Petitioner has a 15-year-old daughter who is a native-born U.S. citizen, as are his four nephews and two nieces. His two sisters are U.S. citizens and his older brother is an LPR. Petitioner's parents did not pursue citizenship for him because they "d[id] not know the in-

tricacies of immigration law." Certified Administrative Record 131.

In 1988, when Petitioner was 22, he was involved in a fight in which another person shot and killed someone. Petitioner was not the shooter; he was charged as an accessory. Due to his minor involvement and cooperation with authorities, Petitioner was allowed to plead to voluntary manslaughter and received a six-year suspended sentence. Pet. App. 31a-32a. He served fewer than two years in county jail and was released on probation immediately after his plea.

In 2005, the government commenced deportation proceedings. The IJ found Petitioner deportable based *inter alia* on his conviction for voluntary manslaughter, an aggravated felony crime of violence. Pet. App. 15a-16a. The IJ informed Petitioner that Section 212(c) "could have been applied to your manslaughter conviction," but erroneously believed that a six-year suspended sentence disqualified him from relief, such that he was unable to submit an application. *Id.* 38a.[8]

The BIA affirmed on different grounds, ruling that Petitioner was categorically ineligible for a Section 212(c) waiver under *Brieva-Perez*. Pet. App. 8a. The

---

[8] As Petitioner explained below (C.A. Br. 36 n.17), the IJ's ruling was doubly wrong. The bar on Section 212(c) relief for LPRs who served "a term of imprisonment of at least five years" was added in 1990 and does not apply to Petitioner's 1989 conviction. 8 C.F.R. §1212.3(f)(4)(ii); *Toia* v. *Fasano*, 334 F.3d 917, 918 (9th Cir. 2003). Even if it did, the 1990 Act refers only to time *served*, and Petitioner served fewer than two years. Pet. App. 32a. Although the IJ also found Petitioner deportable for a second conviction, neither the BIA nor the Ninth Circuit relied on that theory, and it is not before the Court. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943).

Ninth Circuit denied Petitioner's petition for review and denied rehearing. *Id.* 1a-4a, 21a. Justice Kennedy granted a stay of judgment pending this Court's review. *Id.* 39a.

Petitioner was released from immigration custody on bond pending appeal. *Judulang* v. *Chertoff*, 535 F. Supp. 2d 1129 (S.D. Cal. 2008). He lives in Los Angeles with his elderly mother, a U.S. citizen, and works to support himself and his family.

SUMMARY OF ARGUMENT

Although the history of Section 212(c) is complex, its application before the BIA's 2005 decisions in *Blake* and *Brieva-Perez* was straightforward, especially with regard to aggravated felonies and "crimes of violence." Previously, an LPR deportable for an aggravated felony conviction that also rendered him or her inadmissible was entitled to apply for Section 212(c) relief—an application that could be made in exclusion proceedings, deportation proceedings, or directly to the immigration authorities outside proceedings. BIA decisions and agency regulations made clear that a Section 212(c) waiver of inadmissibility operated as relief from deportation based on the particular conviction. The BIA's retreat from this consistent practice in 2005—and the en banc Ninth Circuit's even more radical retreat in 2009—cannot be sustained.

The Ninth Circuit's suggestion that Section 212(c) does not apply in deportation proceedings at all is contrary to years of congressionally approved agency practice. Congress has consistently acknowledged that Section 212(c) provides relief from deportation as well as exclusion, and even the government has not contended

otherwise. Accordingly, the Ninth Circuit's approach offers no basis for affirming the judgment below.

The BIA's new policy announced in *Blake* and *Brieva-Perez* is also invalid under basic principles of administrative law and equal protection.

First, *Blake* and *Brieva-Perez* represent an improperly retroactive change in the BIA's preexisting policies. The BIA fundamentally transformed the statutory counterpart requirement from a test satisfied by nearly all, if not all, LPRs deportable for a "crime of violence" to a test satisfied by *no* such LPR. This new policy cannot be squared with the agency's prior regulations and holdings and works a severe retroactive effect. This retroactive change does not pass muster under the balancing test of *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947): the change is too abrupt; the reliance on the old regime is too significant; the effect on private interests is too severe; and any statutory interest in retroactivity is attenuated at best.

Second, the BIA's new policy is arbitrary and capricious on its own merits, even apart from retroactivity concerns. The BIA has made eligibility for Section 212(c) relief turn on semantic differences in the exclusion and deportation provisions—differences that have no connection whatsoever to congressional intent regarding eligibility for Section 212(c) relief. And they resurrect a distinction based on the "irrelevant and fortuitous factor[]" of a deportable LPR's recent travel history—a distinction the agency has avoided for decades since *Silva*.

Third, the distinction among deportable LPRs based on travel history violates equal protection or, at a minimum, raises serious equal protection concerns. There is no rational basis for distinguishing between

LPRs who traveled abroad and returned before being placed in deportation proceedings and those who did not. The Court should either construe Section 212(c) to avoid that constitutional difficulty or else rule the BIA's new policy unconstitutional and, in either event, restore the agency's pre-2005 practice under which relief did not turn on such an irrational distinction.

In the alternative, and at a minimum, the BIA's retroactive policy change must be remanded because the agency failed the minimal requirement of identifying the change in policy and providing a reasoned explanation for its decision that considers the appropriate factors, most importantly reliance. Here, the BIA not only failed to identify or defend its change in position, but also based its decision on a regulation that did not purport to have—and indeed could not have had—a retroactive effect.

ARGUMENT

I. SECTION 212(C) RELIEF IS AVAILABLE IN DEPORTATION PROCEEDINGS

The en banc Ninth Circuit appeared to rule that Section 212(c) provides "relief only from *inadmissibility* not deportation." *Abebe* v. *Mukasey*, 554 F.3d 1203, 1205 (en banc) (per curiam) (footnote omitted), *full court reh'g denied*, 577 F.3d 1113 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010). Even the government has not advocated that position, and for good reason: Congress has plainly accepted the longstanding judicial

and administrative interpretation of Section 212(c) as available in deportation proceedings.[9]

When Congress enacted Section 212(c) in 1952, it acknowledged the years of consistent agency interpretation of the Seventh Proviso as permitting relief *nunc pro tunc* to aliens in deportation proceedings. *See supra* pp. 6-7. Congress's inclusion in Section 212(c) of language identical in relevant part to the Seventh Proviso, without "revis[ing] or repeal[ing] the agency's interpretation[,] is persuasive evidence that the interpretation is the one intended by Congress." *NLRB* v. *Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 275 (1974); *see also Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (Congress presumptively adopts a longstanding administrative "interpretation when it re-enacts a statute without change"); *Matter of S-*, 6 I. & N. Dec. 392, 396 (BIA 1954) ("[T]here is nothing to indicate that Congress wished to cut off this unique relief in deportation proceedings.").

In fact, Congress has taken express action predicated on the availability of Section 212(c) relief in deportation proceedings. In 1990, Congress disqualified deportable LPRs from Section 212(c) relief if they "fail[ed] to appear" for certain hearings or as otherwise

---

[9] The Ninth Circuit curiously made its ruling of little or no consequence by holding that, even if Section 212(c) does not itself entitle LPRs to relief in deportation proceedings, "nothing we say today casts any doubt on the regulation," which does apply in deportation. *Abebe*, 554 F.3d at 1207 (citing 8 C.F.R. §1212.3). If that regulation is valid—as the Ninth Circuit suggested—then the Ninth Circuit's interpretation of Section 212(c) has no apparent effect on any LPR's eligibility for relief, including Petitioner's. It thus provides no basis to avoid considering the arbitrariness and irrationality of *Blake* and *Brieva-Perez*.

required, 8 U.S.C. §1252b(e) (1991), or if they served more than five years' imprisonment for an "aggravated felony" (8 U.S.C. §1182(c) (1994)). In 1996, Congress provided that Section 212(c) "shall not apply to an alien *who is deportable* by reason of having committed" certain enumerated offenses. 8 U.S.C. §1182(c) (Apr. 24, 1996) (as amended by AEDPA §440(d), 110 Stat. at 1277) (emphasis added). Yet neither Act purported to eliminate Section 212(c) relief from deportation for other LPRs.

If the Ninth Circuit were correct that Congress did not wish *any* deportable alien to receive Section 212(c) relief, it would have been senseless to impose such conditions on the grant of relief to *some* deportable aliens. The agency has admitted as much: "Congress explicitly recognized the applicability of section 212(c) relief to deportation proceedings." 56 Fed. Reg. 50,033 (Oct. 3, 1991); *see also Matter of Meza*, 20 I. & N. Dec. 257, 261 (BIA 1991) (Heilman, Board Member, concurring).

Congress has likewise failed to modify the agency's longstanding position—adopted nationwide in 1976, after the Solicitor General declined to seek certiorari in *Francis*—that Section 212(c) relief is available to deportable aliens regardless of whether or not they left the country. *See Matter of Silva*, 16 I. & N. Dec. 26, 29-30 (BIA 1976). This interpretation, adopted by every regional circuit, is also explicit in the agency's regulations, which have long made clear that Section 212(c) is available to deportable LPRs on the same terms as to excludable LPRs. *See supra* pp. 8-11. Mr. St. Cyr himself was deemed eligible for Section 212(c) relief in his deportation proceeding with no indication that he had left and reentered after his conviction. *INS* v. *St. Cyr*, 533 U.S. 289, 326 (2001).

Because Congress "has not sought to alter [the agency's] interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979); *see also Boeing Co.* v. *United States*, 537 U.S. 437, 456-457 (2003) (Congress's failure to override a seven-year-old regulation when amending relevant statutory provisions "serves as persuasive evidence that Congress regarded that regulation as a correct implementation of its intent."); *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 118 (2002) ("By amending the law without repudiating the regulation[s], Congress suggests its consent to the [agency's] practice." (quotation marks omitted)). The availability of Section 212(c) relief in deportation proceedings regardless of travel history has thus "gone untouched" for decades despite other amendments. *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2252 (2011).

This unequivocal legislative record—which the *Abebe* majority did not even address—confirms the incorrectness of the Ninth Circuit's view. We accordingly turn from the Ninth Circuit's erroneous approach to the BIA's.

II. THE BIA'S NEW POLICY ANNOUNCED IN *BLAKE* AND *BRIEVA-PEREZ* IS ARBITRARY AND CAPRICIOUS

A. The BIA's Change In Law Was Impermissibly Retroactive

Petitioner submits that this case may be decided on the narrow basis that the BIA acted arbitrarily and capriciously in applying its *Blake* and *Brieva-Perez* decisions to attach new consequences to guilty pleas entered in reliance on the prior regime. While the new policy *itself* is also arbitrary and unconstitutional (*see*

infra Parts II.B-C), the Court need not address those issues if it rules that the *Blake/Brieva-Perez* approach cannot be imposed so as to create a retroactive effect.

1. The BIA's *Blake* and *Brieva-Perez* decisions retroactively changed the law

There can be no question that the BIA's 2005 rulings in *Blake* and *Brieva-Perez* were a "change in law." *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005) (per curiam); *see supra* n.7 (citing cases). Indeed, the government itself recently recognized that "the Board's decisions in *Blake* and *Brieva* ... constituted an intervening change in the law." Resp. Br. 16, *Paulo* v. *Holder*, No. 07-71198 (9th Cir. Nov. 12, 2010).[10]

Even without these admissions, it is plain that, prior to *Blake* and *Brieva-Perez*, the BIA and the federal courts held that LPRs could seek waivers of aggravated felony convictions, including "crimes of violence," in deportation proceedings. *See, e.g.*, *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 590-591 (BIA 1992) (LPR convicted of attempted murder "is not barred from applying for section 212(c) relief"); *Matter of A-A-*, 20 I. & N. Dec. 492, 500-501 (BIA 1992) (LPR convicted of murder would be eligible for Section 212(c) relief but for length of sentence); *supra* pp. 17-18 & n.4 (citing cases).

---

[10] Admitting that *Blake* and *Brieva-Perez* changed the law benefited the government in *Paulo* because it meant that a prior court ruling that a "crime of violence" aggravated felony was eligible for a Section 212(c) waiver was not res judicata. The government maintained that position at oral argument, even after filing its brief in opposition in this case.

The government has ventured that *Blake* and *Brieva-Perez* were not changes in policy because the BIA has consistently held that deportable LPRs seeking Section 212(c) relief must meet the "statutory counterpart" requirement. *E.g.*, Opp. 2-3, 17. The government confuses the *existence* of a "statutory counterpart" requirement—which Petitioner has never disputed—with the radically-different *application* of that rule announced for the first time in *Blake*.[11]

Prior to *Blake*, the "statutory counterpart" requirement ensured that the conviction for which the applicant sought a waiver was not solely a deportable offense, but also a waivable basis for inadmissibility. This requirement reflected the recognition that "an alien subject to deportation must have *the same opportunity to seek discretionary relief* as an alien who has temporarily left this country and, *upon reentry, been subject to exclusion.*" *Matter of Hernandez-Casillas*,

---

[11] In certain appellate decisions that rejected retroactivity challenges to *Blake*, the challenge was likewise framed as an argument that the statutory counterpart requirement was new in 2005, which is incorrect. *E.g.*, *Paulo* v. *Holder*, 2011 WL 1663572, at *8 (9th Cir. May 4, 2011) ("The statutory counterpart rule has existed for at least thirty years."); *Vue* v. *Gonzales*, 496 F.3d 858, 863 (8th Cir. 2007) (the 2004 regulation "merely codifies established law"); *Valere* v. *Gonzales*, 473 F.3d 757, 761-762 (7th Cir. 2007) (rejecting petitioner's retroactivity argument because the statutory counterpart "rule itself is not new"). The statutory counterpart requirement *in general* has long been recognized; Petitioner has never argued otherwise. The point is that, before 2005, the requirement was *satisfied* by any LPR deportable for an aggravated felony conviction that also triggered exclusion, regardless of any difference in the language of deportation or exclusion provisions. *See Meza*, 20 I. & N. Dec. at 259; *supra* nn.4-5 (citing cases).

20 I. & N. Dec. 262, 287 (Att'y Gen. 1991) (emphasis added). Conversely, a deportable alien was not entitled to relief "when that same alien would not have occasion to seek such relief were he in exclusion proceedings instead." *Matter of Jimenez-Santillano*, 21 I. & N. Dec. 567, 575 (BIA 1996). The agency regulations and forms implement this requirement by directing that Section 212(c) applicants—whether in deportation or exclusion proceedings or requesting relief affirmatively from the district director—identify the "reasons" why they "may be inadmissible to the United States." *See* App. 23a (Form I-191); *see also* 8 C.F.R. §1212.3(a), (e) (directing the filing of Section 212(c) requests on Form I-191 regardless of forum).

The agency thus made clear before *Blake* that a deportable LPR could satisfy the statutory counterpart requirement even where the LPR was deportable under a subsection of the INA's deportation provision that was phrased differently from any subsection of the INA's exclusion provision, such as the "aggravated felony" subsection, which appears in the deportation provision but not the exclusion provision. Although the government initially argued that "aggravated felony" had no statutory counterpart, the BIA rejected that view, ruling that "waiver under section 212(c) is not unavailable to an alien convicted of an aggravated felony simply because there is no ground of exclusion which recites the words, 'convicted of an aggravated felony,' as in [8 U.S.C. §1227(a)(2)(A)(iii)]." *Meza*, 20 I. & N. Dec. at 259. Rather, what mattered was whether the aggravated felony "*conviction* ... could also form the basis for excludability." *Id.* (emphasis added); *see also Matter of Munoz*, 28 Immigr. Rep. B1-1 (BIA Aug. 7, 2003) (Pet. App. 52a) ("[W]e have found that an alien convicted of an aggravated felony may be eligible for a

waiver under section 212(c) of the Act when *the conviction* could also lead to inadmissibility under section 212(a)" (emphasis added)).

These rulings comport with the BIA's longstanding recognition that, if Section 212(c) relief waives *exclusion* based on a particular criminal conviction, it also waives *deportation* based on the same conviction. *E.g.*, *Matter of G-A-*, 7 I. & N. Dec. 274, 275 (BIA 1956) ("[I]f [Section 212(c)] is exercised to waive a ground of inadmissibility based upon a criminal conviction, a deportation proceeding cannot thereafter be properly instituted based upon the same conviction[.]"); *Matter of Mascorro-Perales*, 12 I. & N. Dec. 228, 230 (BIA 1967) ("[I]f a single act can be the basis of both excludability and deportability, and excludability is waived by the Attorney General, then *that act, without more, cannot be the basis of a deportation charge.*" (emphasis added)).

The statutory counterpart requirement thus ensured that deportable LPRs were not refused the opportunity to seek relief based on the "irrelevant and fortuitous factor[]" of having never departed and reentered following their conviction. *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976). If the LPR would have been eligible for relief had he or she left the country and been placed in exclusion proceedings upon return (under the plain text of Section 212(c)), or eligible for relief *nunc pro tunc* in deportation proceedings begun after reentry (under *G-A-*), or eligible before leaving the country on an affirmative petition to the district director (under agency regulations), then there was no legitimate reason to treat the LPR as ineligible simply because he or she failed to depart before proceedings began.

Thus, for example, the BIA denied relief to an LPR convicted of a firearms offense because a "*[c]onviction* for possession of a concealed sawed-off shotgun is not *a specified section 212(a) ground of excludability*, nor *a crime involving moral turpitude* that would render the respondent excludable." *Matter of Granados*, 16 I. & N. Dec. 726, 728 (BIA 1979) (emphases added); *see also Cabasug* v. *INS*, 847 F.2d 1321, 1327 (9th Cir. 1988) (Wallace, J., concurring) (it would violate equal protection "to distinguish between *aliens who had committed the same crime* on the basis of whether they traveled abroad recently" (emphasis added)). As a result, only LPRs whose deportable convictions were not also excludable—a small category—failed to satisfy the statutory counterpart rule. *Hernandez-Casillas*, 20 I. & N. Dec. at 282 n.4 (identifying only possession of firearms convictions and illegal entry as ineligible for Section 212(c) waiver under statutory counterpart analysis).[12]

---

[12] The Attorney General identified only these two narrow categories—firearms and illegal entry—even *after* aggravated felonies in general, and crimes of violence in particular, were added as bases for deportation. In discussing these two categories alone, the BIA's invocation of the term "grounds" has been inconsistent. *Compare Granados*, 16 I. & N. Dec. at 728, 729 (conviction for sawed-off shotgun possession "does not come within the *grounds* of excludability" where it is not "a crime involving moral turpitude that would render the respondent excludable" (emphasis added)), *with Matter of Esposito*, 21 I. & N. Dec. 1, 10 (BIA 1995) ("[R]espondent is ineligible for relief under section 212(c) of the Act because he has been found deportable under a ground of deportation which does not *itself* have a comparable ground of exclusion." (emphasis added)). That inconsistent usage is irrelevant because the *regulations* have consistently provided that an LPR convicted of a CIMT could apply for a waiver of inadmissibility in deportation or exclusion proceedings (or affirmatively apply to the district director), and while a grant of relief was technically called

The government has never identified a pre-2005 decision, regulation, or policy statement suggesting that LPRs deportable for "crime of violence" or "sexual abuse of a minor" aggravated felony convictions are categorically barred from relief under the statutory counterpart requirement. By contrast, many cases and authorities held the contrary. *See supra* pp. 17-19 & nn.4-5.

Blake and *Brieva-Perez* changed all this. While those decisions did not create the statutory counterpart requirement, they certainly altered its fundamental character. Instead of determining whether the deportable conviction triggered inadmissibility—a test that LPRs deportable for a "crime of violence" conviction would generally and perhaps invariably satisfy—the BIA focused the inquiry on a search for an exclusion provision that used similar *language* to the charged deportation category. And the relevant comparator was not the deportation provision's own term—"aggravated felony," 8 U.S.C. §1227(a)(2)(A)(iii)—but rather the language describing the separate *subcategories* of aggravated felony, which are found in the INA's general definition section, *id.* §1101(a)(43).

So reformulated, the inquiry could not be met by *any* LPR convicted of a "crime of violence" aggravated

---

a waiver of inadmissibility, it would not only protect the LPR from "grounds" of exclusion, but also from "ground[s]" of deportation based on the same "conviction." *G-A-*, 7 I. & N. Dec. at 275; *supra* pp. 8-11. And as to the aggravated felony "ground" of deportation in particular, the BIA's position before *Blake* and *Brieva-Perez* was unambiguous: Section 212(c) is "not unavailable" to LPRs deportable on that "ground." *Meza*, 20 I. & N. Dec. at 259; *see also Esposito*, 21 I. & N. Dec. at 9 (distinguishing *Meza* as "based on the specific amendment ... regarding aggravated felonies").

felony. This was plainly a change that made many previously eligible LPRs permanently ineligible for Section 212(c) relief—a fact demonstrated most starkly by the BIA's reversal of grants of relief in pending cases due to the "change in law." *See Cardona*, 2005 WL 3709244; *supra* n.7.

Applying this change in course to LPRs who pled guilty under the preexisting regime unquestionably works a "retroactive" effect in the sense of "'attach[ing] a new disability, in respect to transactions or considerations already past.'" *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269 (1994) (quoting *Society for Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756 (C.C.N.H. 1814) (Story, J.)). Indeed, this Court has already held that "the elimination of any possibility of §212(c) relief" "has an obvious and severe retroactive effect" on those who pled guilty under a prior scheme that would have afforded the possibility of such relief. *St. Cyr*, 533 U.S. at 321, 325.

The question, then, is whether there was an adequate reason for the BIA to impose that severe retroactive effect. There was not.

2. There was no adequate reason for the BIA's retroactive change in law

While agencies are not foreclosed from reconsidering their substantive positions, "an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests." *Heckler* v. *Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 n.12 (1984). This Court has thus approved new policies announced through adjudication, but only where no "new liability [would] be imposed on individuals for past actions

which were taken in good-faith reliance on Board pronouncements" and where no "fines or damages [were] involved." *NLRB* v. *Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 295 (1974). Retroactive changes in law through agency adjudication are disfavored; because an agency can always "make new law prospectively" through rulemaking, "[t]he function of filling in the interstices of the Act should be performed, as much as possible, through th[e] quasi-legislative promulgation of rules to be applied in the future." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947); *see also NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.) (recognizing the "rather pointed hint" in *Chenery* and noting that retroactive reversals of policy "raise[] judicial hackles considerably more" than mere extensions of policy to questions of first impression).

Thus, when an agency seeks to change the law retroactively, the "ill effect" of "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *Chenery*, 332 U.S. at 203; *see also* Breyer et al., *Administrative Law and Regulatory Policy* 466 (6th ed. 2006) (*Chenery* "suggests that ... a balancing approach is appropriate," which would involve "courts attempt[ing] to evaluate and balance the justifications for an adjudicatory policy change against the harm to expectation interests that it would cause"). Although this Court has not yet had occasion to elaborate on *Chenery*'s balancing approach, the courts of appeals generally consider five factors:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void

> in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Retail, Wholesale & Dep't Store Union v. *NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). This Court has recognized this approach in passing, *see Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 207-208 (1988), and every circuit to consider the issue has followed it or a very close variant, including in immigration cases, *e.g.*, *Miguel-Miguel* v. *Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007).[13]

1-2. The first two considerations—whether the case is one of "first impression" and whether it represents an "abrupt departure from well established practice"—cut against applying the BIA's *Blake* and *Brieva-Perez*

---

[13] *See also Lehman* v. *Burnley*, 866 F.2d 33, 37 (2d Cir. 1989); *Laborers' Int'l Union* v. *Foster Wheeler Corp.*, 26 F.3d 375, 392 (3d Cir. 1994); *ARA Servs., Inc.* v. *NLRB*, 71 F.3d 129, 135 (4th Cir. 1995); *Microcomputer Tech. Inst.* v. *Riley*, 139 F.3d 1044, 1050-51 (5th Cir. 1998) (recognizing *Retail, Wholesale* as the "most oft-cited approach" and applying a similar test); *J.L. Foti Constr. Co.* v. *OSHA Review Comm'n*, 687 F.2d 853, 858 & n.5 (6th Cir. 1987); *NLRB* v. *Wayne Transp.* 776 F.2d 745, 751 & n.8 (7th Cir. 1985); *Ryan Heating Co.* v. *NLRB*, 942 F.2d 1287, 1289 (8th Cir. 1991) (applying three-factor test and recognizing that *Retail, Wholesale* "employ[s] [a] similar combination[] of factors"); *Stewart Capital Corp.* v. *Andrus*, 701 F.2d 846, 848-850 (10th Cir. 1983); *see generally* 2 Pierce, *Administrative Law Treatise* 1126 (5th ed. 2010) (*Retail, Wholesale* is an "important decision" that "can be especially useful" in determining the reasonableness of retroactive application of new agency policy).

decisions retroactively. As Judge Friendly observed, "the problem of retroactive application has a somewhat different aspect in cases not of first but of second impression." *Majestic Weaving*, 355 F.2d at 860. As described above, the application of the statutory counterpart requirement to aggravated felony crimes of violence was well-settled through multiple published and unpublished BIA and court decisions, as well as in authoritative treatises. *See supra* pp. 17-19 & n.4. In fact, many BIA decisions specifically rejected the very approach to the statutory counterpart requirement later adopted in *Blake*. *See supra* pp. 17-19 & nn.4-5.[14]

Blake was certainly an "abrupt departure" from prior practice. *E.g.*, *De la Rosa* v. *U.S. Att'y Gen.*, 579 F.3d 1327, 1332 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010) (a "watershed moment in [Section] 212(c) jurisprudence"). Numerous decisions had ruled, contrary to *Blake*, that an LPR deportable for a "crime of violence" or "sexual abuse of a minor" aggravated felony was eligible for Section 212(c) relief. *Cf. Majestic Weaving*, 355 F.2d at 861 ("In this case, we might well conclude that where for fifteen years the Board" followed the contrary position, "'the ill effect of the retroactive application of a new standard' so far outweighs any demonstrated need for immediate application to past conduct as to render the action 'arbitrary.'" (citation omitted)).

---

[14] The fact that some decisions are unpublished confirms that the previous rule had become uncontroversial. The BIA abstains from publishing its opinions where they do not involve the "alteration, modification, or clarification of an existing rule of law." *BIA Practice Manual* §1.4(d)(i)(A) (rev. July 30, 2004), *available at* http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/tocfull.pdf.

In short, this was not a situation in which the agency encountered a previously unknown threat to adequate enforcement or had to apply an evolving line of decisions to a new factual situation. Instead, it adopted a policy inconsistent with the holdings of numerous prior adjudications and diverged from previous statements of its policy.

3. The third consideration—the extent of the party's reliance on the prior policy—also counsels against permitting retroactive application here. As this Court recognized in *St. Cyr*, plea agreements represent a "*quid pro quo* between a criminal defendant and the government" and the availability of Section 212(c) relief notwithstanding the guilty plea is an important part of that bargain for an LPR. 533 U.S. at 321, 322-324. As in *St. Cyr*, the BIA's ruling here retroactively altered the terms of that bargain. This is especially so because Section 212(c) relief is granted with relative frequency to eligible LPRs, *id.* at 296 & n.5, and immigration consequences are among the most palpable concerns of LPRs accused of potentially deportable offenses, *id.* at 322-323 & n.48. Moreover, a plea agreement entered in reliance on the previous regime deserves particular recognition because the government *benefits* from the LPR's detrimental reliance through the guilty plea. *See id.* at 322-324.

4. The burden of retroactivity visited on Petitioner is unquestionable: deportation "may result ... in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922); *see also Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1486 (2010). The consequences of mandatory deportation are especially severe in the case of otherwise-eligible Section 212(c) applicants. By definition, each is an LPR of long residence; many, like Petitioner, have

resided in the United States since early childhood. Their connection to the United States is powerful and they would be particularly harmed by removal from a country that is, in every meaningful sense, their home. Indeed, the lack of U.S. citizenship may, as in Petitioner's case, result from nothing more than a parent's unknowing nonfeasance.[15]

5. Finally, and perhaps unusually, the fifth factor—the statutory interest in applying policy retroactively—does not support the agency's position here. As detailed in Part II.B below, neither the BIA nor the government has ever identified a coherent reason for making Section 212(c) relief turn on semantic discrepancies between the deportation and exclusion provisions. Nor is there any reason to treat LPRs who did not leave the country before the inception of deportation proceedings differently from LPRs convicted of the same crime who left and reentered and can thus seek relief *nunc pro tunc* under *G-A-*, 7 I. & N. Dec. at 275-276.

More importantly, however, refusing retroactive application to *Blake* and *Brieva-Perez* ultimately does no harm to the enforcement scheme because actual relief on the merits remains *discretionary*. *Cf. Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2589 (2010) (noting limited practical effect of rejecting government's view because, although alien "may now ... avoid the harsh consequence of mandatory removal[,] ...

---

[15] Petitioner's parents could have sought citizenship for him, but did not. Had Petitioner's mother naturalized before he turned 18, he would have become a citizen by operation of law. 8 U.S.C. §1432(a) (1988). She naturalized when he was 18 years and 11 months old. Pet. App. 36a-37a.

[a]ny relief he may obtain depends upon the discretion of the Attorney General"). All that Petitioner seeks is that an IJ *consider* his application under the agency's established standards for Section 212(c) relief. *E.g.*, *Matter of Marin*, 16 I. & N. Dec. 581, 584-585 (BIA 1978). The Department has very little (if any) "statutory interest" in refusing to do even *that*.

Moreover, retroactive application is not necessary here to deter parties from seeking loopholes in existing rules. Nor is there any "equal and opposite loss that non-retroactivity would inflict on" any counterparties. *Qwest Servs. Corp.* v. *FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007). The only counterparty is the agency itself, and in any case where public policy legitimately so requires, the agency can deny relief as a matter of discretion.

B. *Blake* And *Brieva-Perez* Are Arbitrary And Capricious On Their Own Merits

Even absent a severe retroactive effect, the BIA's new policy would still be arbitrary and capricious for three related reasons.[16]

First, there is no reason to make relief under Section 212(c) turn on linguistic disparities between the deportation and exclusion provisions. While the 1990 Act made aliens convicted of a "crime of violence" aggravated felony deportable, Congress nowhere sug-

---

[16] Whether understood under the Administrative Procedure Act, 5 U.S.C. §706(2)(A), or under the second step of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 843 (1984), the standard is the same: whether the BIA's policy is "arbitrary or capricious in substance." *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 711 (2011) (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001)).

gested that its use of that phrase was also intended to disqualify all LPRs deportable under that provision from seeking Section 212(c) relief. Had Congress wished to impose such a radical change, it would have said so expressly. "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions[.]" *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Indeed, when Congress imposed other limitations on Section 212(c) relief in the 1990 and 1996 Acts, it did say so expressly. *See supra* pp. 14-16. And what it said in the 1990 Act was that aggravated felons serving sentences over five years would be ineligible for a Section 212(c) waiver, strongly signaling its understanding that *other* aggravated felons—including the "crime of violence" class it *simultaneously* created—remained eligible for relief. *See Meza*, 20 I. & N. Dec. at 260-261 (Heilman, Board Member, concurring).

The language of the exclusion and deportation provisions reflects Congress's concerns regarding who is excludable and deportable. There is no reason to believe that a comparison between the two provisions determines who should be eligible for relief under Section 212(c). To give those linguistic choices that effect is simply arbitrary.

That is especially true because, when Congress added crimes of violence and sexual abuse as deportable aggravated felonies, it had no reason to add them as bases for exclusion—aliens were already excludable for a CIMT punishable by over a year of incarceration. 8 U.S.C. §1182(a)(2)(A). Moreover, between the addition of "crimes of violence" in 1990 and crimes involving "sexual abuse" in 1996, the BIA was already extending Section 212(c) eligibility to aliens convicted of crimes of violence, *see supra* pp. 17-18 & n.4, and so Congress

would have had no reason to know that maintaining eligibility for relief required it to add a special, superfluous exclusion provision with matching language. Indeed, the matching language the BIA treats as preserving Section 212(c) waivers for aggravated felonies of drug trafficking, *see Meza*, 20 I. & N. Dec. at 259, only exists because it has been in the exclusion provision since the original INA and covers not only persons *convicted* of a trafficking crime, but the broader class of persons reasonably *believed* to be drug traffickers. *See* INA §212(a)(23), 66 Stat. 163, 184 (codified at §1182(a)(2)(C)).

The BIA's reasoning in *Blake* and *Brieva-Perez* is particularly irrational because it compares the language of the exclusion provision (INA §212(a)) not to the language of the relevant *deportation provision* itself (INA §237(a)), but to the *subcategory* of "aggravated felony" listed in the INA's general definitions provision (INA §101(a)(43)). *See Blake*, 23 I. & N. Dec. at 727. There is no reason whatsoever to believe that Congress phrased the subcategories of "aggravated felony"—subcategories that have changed significantly over time, *see St. Cyr*, 533 U.S. at 295-296 & n.4—with the view that Section 212(c) eligibility would turn on whether their language harmonized with or differed from exclusion provisions. Indeed, the "crime of violence" subcategory was chosen simply as a way to import a parallel concept from the criminal law, *see* 8 U.S.C. §1101(a)(43)(F) (incorporating definition from 18 U.S.C. §16).[17]

---

[17] Furthermore, even if Section 212(c) eligibility were properly determined through comparisons of entire deportation and exclusion subsections, rather than by asking whether the LPR was deportable for a conviction that also made him or her excludable, it

Second, the BIA's new doctrine recreates the arbitrary distinction based on travel abroad that the BIA abandoned years ago in *Silva*. There is no question that LPRs with excludable convictions who travel abroad and reenter are eligible for Section 212(c) relief *nunc pro tunc* in later-commenced deportation proceedings, nor is there any question that a grant of relief would protect such an LPR from deportation based on that conviction. *See G-A-*, 7 I. & N. Dec. at 276 (grant of Section 212(c) relief, *nunc pro tunc*, provides "admi[ssion] with freedom from deportation" (quotation marks omitted)); *see also* 8 C.F.R. §1212.3(d) ("Once an application is approved, that approval is valid indefinitely."); *Matter of Balderas*, 20 I. & N. Dec. 389, 393 (BIA 1991) ("Th[is] regulation[] reflect[s] our concern that a waiver, once granted, should remain valid indefinitely for all proceedings, including both deportation and exclusion proceedings."). But the BIA's new approach once again denies the same eligibility to an LPR who never departed and reentered.

There is no justification for the BIA's current approach, and the government has so far articulated none.

---

is hard to imagine that there are many *aggravated felonies* that are crimes of *violence* or *sexual abuse* of a *minor* that somehow involve no moral turpitude or are petty offenses. *See Carachuri-Rosendo*, 130 S. Ct. at 2585 ("A 'felony,' we have come to understand, is a 'serious crime usu[ally] punishable by imprisonment for more than one year or by death,' [and] [a]n 'aggravated' offense is one 'made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime.'" (citation omitted)). To the extent there are any aggravated-felony crimes of violence that are not CIMTs, the set is very small, and the BIA has said that—even in its brave new world—there "need not be a perfect match." *Blake*, 23 I. & N. Dec. at 729; *see also* Opp. 14.

This is not a case in which Congress has "draw[n] lines on the basis of general categories of offenses as defined by statutes." Opp. 13. Rather, the BIA distinguishes between LPRs convicted of the *same* offense and charged under the *same* deportation subsection based solely on whether the LPR previously traveled abroad. The agency has never suggested that an LPR who took a short trip sometime in the past is somehow a more compelling case for discretionary mercy than an identically situated LPR who did not; as then-Attorney General Jackson put it: "[t]o require [Petitioner] to go to Canada and reenter will make him no better resident of this country." *Matter of L-*, 1 I. & N. Dec. 1, 6 (Att'y Gen. 1940). If anything, the law is to the contrary, favoring the LPR who evinces greater ties to the United States by staying here. *See* Hutchinson, *Legislative History of American Immigration Policy 1798-1965*, 505 (1981) (Congress made clear that "the most highly approved immigrant was one who came with the intention of remaining permanently, becoming a citizen, and bringing his family or establishing it after arrival").[18]

---

[18] The hypothesis that Congress meant to "create[] an incentive for deportable aliens to leave the country" in part so that LPRs who are denied Section 212(c) relief will be "outside our borders when they get the bad news," *Abebe*, 554 F.3d at 1206-1207 (quotation marks omitted), is refuted by what Congress actually did. First, Congress codified the agency's practice of granting relief *nunc pro tunc* to LPRs who previously departed but were then put into deportation proceedings *inside* our borders. *See supra* pp. 6-7. Second, despite many other revisions to Section 212(c), Congress left untouched the BIA's post-*Silva* practice of granting Section 212(c) relief to deportable LPRs inside the country regardless of whether they had left the country or not, as long as they would have been eligible for relief if there had been a prior departure. *See supra* Part I. And third, Congress let stand

Third, the BIA's new policy reopens the risk of a further absurd result that the agency has consistently avoided: that an LPR could obtain relief from inadmissibility for a particular conviction yet still be deported for the same underlying conduct. The BIA has long recognized that, "when relief has been granted in accordance with [Section 212(c)], it would be clearly repugnant to say that the respondent remains deportable because of the same conviction." *G-A-*, 7 I. & N. Dec. at 275-276; *see also Mascorro-Perales*, 12 I. & N. Dec. at 230. The implementing regulations "reflect [the agency's] concern that a waiver, once granted, should remain valid indefinitely for all proceedings, including both deportation and exclusion proceedings." *Balderas*, 20 I. & N. Dec. at 393. In this way, the BIA has avoided the absurd and unfair result of granting Section 212(c) relief from exclusion because of a conviction, only to turn around and deport the same person because of the same conviction.

Under *Blake* and *Brieva-Perez*, however, that absurd result is once again possible—perhaps even re-

---

agency regulations that, to this day, make Section 212(c) relief available to waive exclusion, deportation, and removal as long as the underlying offense renders the LPR "inadmissible to the United States." App. 23a.

The Ninth Circuit's statement that, under its view, "[a] deportable alien who wishes to obtain section 212(c) relief *will know that he can't obtain such relief so long as he remains in the United States*," 554 F.3d at 1206 (emphasis added), is strange, given that decades of judicial and agency precedent told LPRs exactly the opposite. There is no way for LPRs who are already in deportation proceedings to comply with the Ninth Circuit's *retroactively imposed* requirement that they travel abroad before deportation proceedings begin.

quired. For instance, an LPR with an assault conviction who obtains relief in exclusion proceedings for a "crime involving moral turpitude" would not be protected against a deportation charge of a "crime of violence" based on the same conviction and brought the very next day. *Cf. Kim* v. *Gonzales*, 468 F.3d 58, 62 (1st Cir. 2006) (under *Brieva-Perez*, "there is no waiver authority for one who is excluded as an 'aggravated felon' or one who commits a 'crime of violence'").

The BIA's approach is not only illogical but also contrary to the way the agency's own regulations describe the act of seeking Section 212(c) relief in deportation proceedings. Under 8 C.F.R. §1212.3(a), the applicant who files for Section 212(c) relief in a deportation proceeding follows the *exact same procedure* as applicants applying for relief in an exclusion proceeding or making an advance application to a district director, *see* 8 C.F.R. §§212.3(a), (e), 1212.3(a), (e), and *the exact same* substantive validity provision applies to each such request, *id.* §§212.3(d), 1212.3(d). Any one of these applicants can complete Form I-191 if he or she has a conviction for a CIMT because a CIMT conviction is a "reason[]" why the alien is "inadmissible to the United States." App. 23a. As described above, this regulation provides effective relief from exclusion *and* deportation to those who invoke it outside of deportation proceedings. But it applies by its terms to those in deportation proceedings as well, making it manifestly arbitrary to deny eligibility for that same relief to aliens like Petitioner who are equally covered by the regulation's text.

The BIA unquestionably has broad discretion in interpreting the INA. But it has shown no plausible reason for making relief from deportation turn on arbitrary linguistic differences that were never intended to determine Section 212(c) eligibility, particularly where

the only effect is to resurrect an unjustified distinction that the agency has rejected for decades. The BIA's new policy "relie[s] on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem," offered *no* explanation for drawing the distinctions drawn, and ultimately "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Accordingly, it should be set aside as arbitrary and capricious. 5 U.S.C. §706(2)(A).

C. The BIA's Distinction Based On Travel History Raises Serious Equal Protection Concerns

The doctrine of constitutional avoidance provides an additional basis for rejecting the BIA's position. Where a statute is susceptible to more than one plausible construction, one of which raises "serious constitutional doubts," the Court adopts the interpretation that avoids these doubts. *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005); *St. Cyr*, 533 U.S. at 301 n.13. A plausible interpretation of Section 212(c), as accepted by Congress over several decades, is that it permits discretionary relief for all LPRs in deportation proceedings whose convictions would also render them excludable, regardless of whether the LPR previously traveled abroad. The BIA adopted that view in *Silva* to avoid equal protection concerns, and it was the agency's longstanding, consistent position before *Blake*. *Blake*, however, revived the distinction between LPRs in deportation proceedings who previously traveled abroad (who can seek relief *nunc pro tunc*) and LPRs who did not.

The Fourteenth Amendment's guarantee of equal protection, applicable to the federal government through the Due Process Clause of the Fifth Amendment, protects LPRs as well as citizens. *Mathews* v. *Diaz*, 426 U.S. 67, 77-78 (1976); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886). Equal protection "'imposes a requirement of some rationality in the nature of the class singled out.'" *James* v. *Strange*, 407 U.S. 128, 140 (1972) (quoting *Rinaldi* v. *Yeager*, 384 U.S. 305, 308-309 (1966)).[19]

The BIA's distinction in *Blake* is identical to the one discredited in *Francis*, a decision the government did not appeal and that the BIA followed for decades. *Francis* recognized that distinguishing between two LPRs deportable under the same deportation provision due to the same criminal conviction solely because one left the country and reentered is irrational and unrelated to any legitimate governmental interest. *See* 532 F.2d at 273. The irrationality is particularly stark because the BIA's policy gives worse treatment to those who did not leave and who therefore have stronger ties to this country. Neither the BIA nor the government has ever identified a rational basis for "such a distinction without a material difference." *Cabasug*, 847 F.2d at 1326.

---

[19] Although this Court has referred to a "facially legitimate and bona fide reason" standard when examining initial admission decisions, *Fiallo* v. *Bell*, 430 U.S. 787, 794 (1977), that standard does not apply to longstanding residents and, at any rate, is "analytically equivalent" to rational basis review, *Breyer* v. *Meissner*, 214 F.3d 416, 422 n.6 (3d Cir. 2000); *see also, e.g.*, *Johnson* v. *Whitehead*, 2011 WL 1998333, at *5 (4th Cir. May 24, 2011); *Ablang* v. *Reno*, 52 F.3d 801, 804 (9th Cir. 1995); *Azizi* v. *Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990).

Accordingly—to the extent the Court does not reverse the BIA's new rule as impermissibly retroactive or arbitrary and capricious—it should construe it as contrary to Section 212(c), viewed in light of the avoidance canon. Alternatively, the Court should directly hold the BIA's approach unconstitutional as a violation of equal protection. Either way, the correct result is to construe the statute and regulations to permit grants of discretionary relief to LPRs like Petitioner, as the agency routinely did before *Blake*.

D. At A Minimum, The BIA Failed To Consider The Appropriate Factors Under The APA

In the alternative, and at a minimum, this Court should vacate and remand because the BIA has failed to meet the basic "requirement that an agency provide reasoned explanation for its action," which "would ordinarily demand that it display awareness that it *is* changing position." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). Here, the BIA failed even this minimal test by denying that *Blake* and *Brieva-Perez* represented a change at all. When it later admitted the fact, it treated the change as a *fait accompli* that did not require further explanation. *Cardona*, 2005 WL 3709244.

The BIA's failure to follow the APA's requirements for adequate consideration is important because agencies formulating retroactive policy changes must "take[] into account" the "serious reliance interests" engendered by the preexisting policy and provide "a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 129 S. Ct. at 1811. Because the BIA failed even to admit to a change in policy, it failed this requirement as well, denying affected individuals any

accounting for the reliance interests it swept aside. Indeed, even if *Blake* and *Brieva-Perez* could be defended as theoretically appropriate for retroactive application or as substantively reasonable—and they are neither—the agency's failure to acknowledge the change and explain *why* retroactive application was appropriate remains a fatal flaw compelling a remand.

The BIA also relied on irrelevant factors. *Blake* and *Brieva* cited the 2004 regulation as supporting the BIA's decision, but that rulemaking both *did not* purport to alter the status quo, *see supra* pp. 20-22, and *could not* have altered it because Congress has not expressly authorized retroactive rulemaking to implement Section 212(c). *See Bowen*, 488 U.S. at 208. The BIA has since appeared to hold that "the Board's analysis in [*Blake* and *Brieva-Perez*] was expressly adopted by the Attorney General through the promulgation of 8 C.F.R. § 1212.3(f)(5)," which the BIA viewed as depriving it of the power to reconsider those decisions. *Matter of Dimopoulos*, 2011 WL 2261207 (BIA May 17, 2011). But the regulation cannot possibly have adopted *Blake*—the regulation *preceded* and was cited in *Blake*. Either way, however, the regulation did not and could not have changed the law retroactively; the BIA's mistaken invocation of it demonstrates the unprecedented and unjustified nature of *Blake* and *Brieva-Perez*.

Moreover, in invoking the one aspect of the regulations that was irrelevant, the BIA utterly failed to consider the rest of its preexisting regulations, and *those* regulations indicate that the requested relief should be available to LPRs such as Petitioner no less than other applicants. *See supra* pp. 8-11.

Because the BIA relied on inapposite considerations and failed to provide an adequate explanation for its change in position, the BIA's action must be set aside. *State Farm*, 463 U.S. at 43; *see also Chenery*, 332 U.S. at 196 ("If th[e] grounds [actually invoked by the agency] are inadequate or improper, the court is powerless to affirm the administrative action[.]").

CONCLUSION

The judgment of the court of appeals should be reversed with directions that the case be remanded to the Board of Immigration Appeals for further proceedings.

Respectfully submitted.

SETH P. WAXMAN
PAUL R.Q. WOLFSON
JAMES L. QUARLES, III
ERIC F. CITRON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

MARK C. FLEMING
Counsel of Record
MEGAN BARBERO
ELIZABETH KENT CULLEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

JULY 2011

APPENDIX

STATUTES, REGULATIONS, AND FORMS

8 U.S.C. §1101—Definitions

(a) As used in this chapter—

* * *

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to fire-arms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at[1] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[2] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peon-

---

[1] So in original. Probably should be preceded by "is".

age, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[2]

---

[2] So in original. Probably should be followed by a semicolon.

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sen-

tence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

8 U.S.C. §1182—Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political of-

fense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to

which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of Title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

* * *

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

* * *

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h) of this section.

(G) Foreign government officials who have committed particularly severe violations of religious freedom

* * *

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of Title 22, is inadmissible.

* * *

(I) Money laundering

Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of Title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

* * *

8 U.S.C. §1182(c) (1988)—Nonapplicability of subsection (a)(1) to (25), (30), and (31)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under and order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provision of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

8 U.S.C. §1182(c) (1994)—Nonapplicability of subsection (a) [as amended by Immigration Act of 1990]

Aliens lawfully admitted for permanent resident who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

8 U.S.C. §1182(c) (Apr. 24, 1996)—Nonapplicability of subsection (a) [prior to repeal]

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1251(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their com-

mission, otherwise covered by section 1251(a)(2)(A)(i) of this title.

8 U.S.C. §1227—Deportable aliens

(a) Classes of deportable aliens. Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and

regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of Title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of Title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving

possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of Title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C.

App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and[3]

(i) Domestic violence, stalking, and child abuse

* * *

(ii) Violators of protection orders

* * *

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

* * *

8 C.F.R. §212.3 (1992)—Application for the exercise of discretion under section 212(c)

(a) Jurisdiction. An application for the exercise of discretion under section 212(c) of the Act shall be submitted on Form I-191, Application for Advance Permission to Return to Unrelinquished Domicile, to:

(1) The district director having jurisdiction over the area in which the applicant's intended or actual place of residence in the United States is located; or

---

[3] So in original.

(2) The Office of the Immigration Judge if the application is made in the course of proceedings under sections 235, 236, or 242 of the Act.

(b) Filing of application. The application may be filed prior to, at the time of, or at any time after the applicant's departure from or arrival into the United States. All material facts and/or circumstances which the applicant knows or believes apply to the grounds of excludability or deportability must be described. The applicant must also submit all available documentation relating to such grounds.

(c) Decision of the District Director. A district director may grant or deny an application for advance permission to return to an unrelinquished domicile under section 212(c) of the Act, in the exercise of discretion, unless otherwise prohibited by paragraph (f) of this section. The applicant shall be notified of the decision and, if the application is denied, of the reason(s) for denial. No appeal shall lie from denial of the application, but the application may be renewed before an Immigration Judge as provided in paragraph (e) of this section.

(d) Validity. Once an application is approved, that approval is valid indefinitely. However, the approval covers only those specific grounds of excludability or deportability that were described in the application. An application who [sic] failed to describe any other grounds of excludability or deportability, or failed to disclose material facts existing at the time of the approval of the application, remains excludable or deportable under the previously unidentified grounds. If at a later date, the applicant becomes subject to exclusion or deportation based upon these previously unidenti-

fied grounds or upon new ground(s), a new application must be filed with the appropriate district director.

(e) Filing or renewal of applications before an Immigration Judge.

(1) An application for the exercise of discretion under section 212(c) of the Act may be renewed or submitted in proceedings before an Immigration Judge under sections 235, 236, or 242 of the Act, and under this chapter. Such application shall be adjudicated by the Immigration Judge, without regard to whether the applicant previously has made application to the district director.

(2) The Immigration Judge may grant or deny an application for advance permission to return to an unrelinquished domicile under section 212(c) of the Act, in the exercise of discretion, unless otherwise prohibited by paragraph (f) of this section.

(3) An alien otherwise entitled to appeal to the Board of Immigration Appeals may appeal the denial by the Immigration Judge of this application in accordance with the provisions of section 3.36 of this chapter.

(f) Limitations on discretion to grant an application under section 212(c) of the Act. A district director or Immigration Judge shall deny an application for advance permission to enter under section 212(c) of the Act if:

(1) The alien has not been lawfully admitted for permanent residence;

(2) The alien has not maintained lawful permanent resident status in the United States for at least seven consecutive years immediately preceding the filing of the application;

(3) The alien is subject to exclusion from the United States under paragraphs (3)(A), (3)(B), (3)(C), or (3)(E) of section 212(a) of the Act;

(4) The alien has been convicted of an aggravated felony, as defined by section 101(a)(43) of the Act, and has served a term of imprisonment of at least five years for such conviction; or

(5) The alien applies for relief under section 212(c) within five years of the barring act as enumerated in one or more sections of section 242B(e) (1) through (4) of the Act.

8 C.F.R. §1212.3—Application for the exercise of discretion under former section 212(c)

(a) Jurisdiction. An application by an eligible alien for the exercise of discretion under former section 212(c) of the Act (as in effect prior to April 1, 1997), if made in the course of proceedings under section 240 of the Act, or under former sections 235, 236, or 242 of the Act (as in effect prior to April 1, 1997), shall be submitted to the immigration judge by filing Form I–191, Application for Advance Permission to Return to Unrelinquished Domicile.

(b) Filing of application. The application may be filed prior to, at the time of, or at any time after the applicant's departure from or arrival into the United States. All material facts or circumstances that the applicant knows or believes apply to the grounds of excludability, deportability, or removability must be described in the application. The applicant must also submit all available documentation relating to such grounds.

(c) [Reserved]

(d) Validity. Once an application is approved, that approval is valid indefinitely. However, the approval covers only those specific grounds of excludability, deportability, or removability that were described in the application. An applicant who failed to describe any other grounds of excludability, deportability, or removability, or failed to disclose material facts existing at the time of the approval of the application, remains excludable, deportable, or removable under the previously unidentified grounds. If the applicant is excludable, deportable, or removable based upon any previously unidentified grounds a new application must be filed.

(e) Filing or renewal of applications before an immigration judge.

(1) An eligible alien may renew or submit an application for the exercise of discretion under former section 212(c) of the Act in proceedings before an immigration judge under section 240 of the Act, or under former sections 235, 236, or 242 of the Act (as it existed prior to April 1, 1997), and under this chapter. Such application shall be adjudicated by the immigration judge, without regard to whether the applicant previously has made application to the district director.

(2) The immigration judge may grant or deny an application for relief under section 212(c), in the exercise of discretion, unless such relief is prohibited by paragraph (f) of this section or as otherwise provided by law.

(3) An alien otherwise entitled to appeal to the Board of Immigration Appeals may appeal the denial by the immigration judge of this application in

accordance with the provisions of § 1003.38 of this chapter.

(f) Limitations on discretion to grant an application under section 212(c) of the Act. An application for relief under former section 212(c) of the Act shall be denied if:

(1) The alien has not been lawfully admitted for permanent residence;

(2) The alien has not maintained lawful domicile in the United States, as either a lawful permanent resident or a lawful temporary resident pursuant to section 245A or section 210 of the Act, for at least seven consecutive years immediately preceding the filing of the application;

(3) The alien is subject to inadmissibility or exclusion from the United States under paragraphs (3)(A), (3)(B), (3)(C), (3)(E), or (10)(C) of section 212(a) of the Act;

(4) The alien has been charged and found to be deportable or removable on the basis of a crime that is an aggravated felony, as defined in section 101(a)(43) of the Act (as in effect at the time the application for section 212(c) relief is adjudicated), except as follows:

(i) An alien whose convictions for one or more aggravated felonies were entered pursuant to plea agreements made on or after November 29, 1990, but prior to April 24, 1996, is ineligible for section 212(c) relief only if he or she has served a term of imprisonment of five years or more for such aggravated felony or felonies, and

(ii) An alien is not ineligible for section 212(c) relief on account of an aggravated felony con-

viction entered pursuant to a plea agreement that was made before November 29, 1990; or

(5) The alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.

(g) Relief for certain aliens who were in deportation proceedings before April 24, 1996. Section 440(d) of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) shall not apply to any applicant for relief under this section whose deportation proceedings were commenced before the Immigration Court before April 24, 1996.

(h) Availability of section 212(c) relief for aliens who pleaded guilty or nolo contendere to certain crimes. For purposes of this section, the date of the plea agreement will be considered the date the plea agreement was agreed to by the parties. Aliens are not eligible to apply for section 212(c) relief under the provisions of this paragraph with respect to convictions entered after trial.

(1) Pleas before April 24, 1996. Regardless of whether an alien is in exclusion, deportation, or removal proceedings, an eligible alien may apply for relief under former section 212(c) of the Act, without regard to the amendment made by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, with respect to a conviction if the alien pleaded guilty or nolo contendere and the alien's plea agreement was made before April 24, 1996.

(2) Pleas between April 24, 1996 and April 1, 1997. Regardless of whether an alien is in exclusion, de-

portation, or removal proceedings, an eligible alien may apply for relief under former section 212(c) of the Act, as amended by section 440(d) of the Anti-terrorism and Effective Death Penalty Act of 1996, with respect to a conviction if the alien pleaded guilty or nolo contendere and the alien's plea agreement was made on or after April 24, 1996, and before April 1, 1997.

(3) Pleas on or after April 1, 1997. Section 212(c) relief is not available with respect to convictions arising from plea agreements made on or after April 1, 1997.

DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
FORM 1-191, APPLICATION FOR ADVANCE PERMISSION TO RETURN TO UNRELINQUISHED DOMICILE (EXCERPTS)[4]

* * *

(1) I hereby apply for permission to return to the United States under the authority contained in Section 212(c) of the Immigration and Nationality Act.

MY NAME IS: *(First)* *(Middle)* *(Last)*		
DATE OF BIRTH: *(mm/dd/yyyy)*	PLACE OF BIRTH: *(City, Province, Country)*	I AM A CITIZEN/ NATIONAL OF: *(Country)*
PRESENT ADDRESS: *(Street and number, apt. no., city, state, country)*		

(2) I was lawfully admitted to the United States for permanent residence at:

PORT OF ENTRY/ DHS OFFICE:	DATE: *(mm/dd/yyyy)*	NAME OF VESSEL OR OTHER MEANS OF CONVEYANCE

[4] *Available at* http://www.uscis.gov/files/form/i-191.pdf.

* * *

(7) I _____ *(Intend to or have)* depart(ed) temporarily from the United States on or about _____ *(Date—mm/dd/yyyy)* and will remain in _____ *(Country)* approximately _____ *(Length of Time)*, for the purpose of _____; and expect to apply for admission at _____ *(Port)*

(8) I believe I may be inadmissible to the United States for the following reasons:

_____

_____

_____

I understand that the information may be used in any criminal or civil proceedings, including removal, hereafter instituted against me.

I certify that the statements above are true and correct to the best of my knowledge and belief.

_____

(Signature of Applicant)

* * *

DEPARTMENT OF HOMELAND SECURITY U.S. CITIZENSHIP AND IMMIGRATION SERVICES INSTRUCTIONS FOR FORM 1-191, APPLICATION FOR ADVANCE PERMISSION TO RETURN TO UNRELINQUISHED DOMICILE (EXCERPTS)[5]

* * *

General Instructions

Step 1. Fill Out the Form I-191

1. Type or print legibly in black ink.

2. If extra space is needed to complete any item, attach a continuation sheet, indicate the item number, and date and sign each sheet.

3. Answer all questions fully and accurately. State that an item is not applicable with "N/A." If the answer is none, write "none."

4. List specifically and in detail your reasons for possible inadmissibility. For example, if the application is made because you may be inadmissible due to a conviction of a crime, state in the application the designation of the crime, the date and place of its commission and of the conviction therefore, and the sentence or other judgment of the court. In the case of a disease, mental or physical defect or other disability, give an exact description, duration thereof and the date and place last treated.

---

[5] *Available at* http://www.uscis.gov/files/form/i-191instr.pdf.

5. If the applicant is mentally incompetent or is under 14 years of age, the application shall be executed by his parent or guardian.

6. When completing **Number 3** on the form, where absences have been numerous as a resident alien border crosser or as a seaman, it will be sufficient to give the approximate number of such absences during the years covered.

* * *

Where To File?

This form, when completely executed, must be mailed to one of the USCIS Texas Service Center facility addresses listed below.

For U.S. Postal Service (USPS) deliveries, use:

USCIC
Texas Service Center
P.O. Box 850965
Dallas, TX 75185

For Express mail and courier deliveries, use:

USCIC
Texas Service Center
4141 N. St. Augustine Road
Dallas, TX 75227

* * *

RESPONDENT'S BRIEF

No. 10-694

In the Supreme Court of the United States

JOEL JUDULANG, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

CURTIS E. GANNON
Assistant to the Solicitor General

DONALD E. KEENER
ALISON R. DRUCKER
ANDREW MACLACHLAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and excludable under differently phrased statutory subsections, and who did not depart and re-enter the United States between the time of his conviction and the commencement of removal proceedings, is foreclosed from seeking discretionary relief from removal under former Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Summary of argument 15
Argument:
The Department of Justice has reasonably declined to extend Section 212(c) eligibility to aliens whose ground of deportability is not comparable to any ground of inadmissibility 17
A. The Board's statutory-counterpart rule reflects a reasonable application of the statute 18
1. Given the statute's reference to waiving grounds of inadmissibility, it is reasonable to require an alien's charged ground of deportability to be categorically comparable to a ground of inadmissibility before it can be waived 21
2. In applying a grounds-based approach, it is reasonable to distinguish crimes of violence from crimes involving moral turpitude 26
3. The statutory-counterpart rule does not make Section 212(c) eligibility depend solely on whether an alien has left the United States 28
B. The Board's 2005 decision applying its statutory-counterpart rule to the crime-of-violence aggravated felony ground of deportability did not reflect a change in the law 30

Table of Contents—Continued: Page

1. There was no established pre-2005 practice of treating the crime-of-violence aggravated felony ground of deportability as comparable to a ground of inadmissibility 30
2. The Board, more generally, had long used a grounds-based approach in analyzing comparability and had rejected petitioner's conviction-based approach 40

C. The Board's application of its statutory-counterpart rule is not impermissibly retroactive 43

D. The statutory-counterpart rule does not raise equal-protection concerns 49

Conclusion 54

Appendix – *In re Cardona*, No. A40 065 318 (B.I.A. Jan. 24, 2008) 1a

TABLE OF AUTHORITIES

Cases:

A-A-, *In re*, 20 I. & N. Dec. 492 (B.I.A. 1992) 31, 32, 33

Abebe v. *Gonzales*, 493 F.3d 1092 (2007), reh'g granted, 514 F.3d 909 (2008), superseded on reh'g, 554 F.3d 1203 (9th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010) 14

Abebe v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010) 14, 18, 51

Aguilar-Ramos v. *Holder*, 594 F.3d 701 (9th Cir. 2010) 17, 48

Ajdin v. *Bureau of Citizenship & Immigration Servs.*, 437 F.3d 261 (2d Cir. 2006) 35

Cases—Continued: Page

Alvarez v. *Mukasey*, 282 Fed. Appx. 718 (10th Cir. 2008) 17

Arias-Uribe, In re, 13 I. & N. Dec. 696 (B.I.A. 1971), aff'd, 466 F.2d 1198 (9th Cir. 1972) 6

Arreguin, In re, 21 I. & N. Dec. 38 (B.I.A. 1995) 47

Balderas, In re, 20 I. & N. Dec. 389 (B.I.A. 1991) 26, 42

Banuelos-Delena, In re, No. A92 789 794, 2006 WL 901335 (B.I.A. Mar. 2, 2006) 38

Blake, In re, 23 I. & N. Dec. 722 (B.I.A. 2005), remanded, 489 F.3d 88 (2d Cir. 2007) 10

Blake v. *Carbone*, 489 F.3d 88 (2d Cir. 2007) ..... *passim*

Brieva-Perez, In re, 23 I. & N. Dec. 766 (B.I.A. 2005), petition for review denied, 482 F.3d 356 (5th Cir. 2007) 10, 23, 26, 27, 36

Calderon-Minchola v. *Attorney Gen.*, 258 Fed. Appx. 425 (3d Cir. 2007) 28

Cardona, In re:

No. A40 065 318, 2005 WL 3709244 (B.I.A. Dec. 27, 2005) 38

No. A40 065 318 (B.I.A. Jan. 24, 2008) 38

Caro-Lozano, In re, No. A90 870 395, 2004 WL 1398661 (B.I.A. Apr. 22, 2004) 36

Caroleo v. *Gonzales*, 476 F.3d 158 (3d Cir. 2007) 17, 20, 39

Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) .. 19, 20

Dalombo Fontes v. *Gonzales*, 483 F.3d 115 (1st Cir. 2007), cert. denied, 553 U.S. 1055 (2008) 28, 46

De Araujo v. *Gonzales*, 457 F.3d 146 (1st Cir. 2006) 34

Cases—Continued: Page

De la Rosa v. *Attorney Gen.*, 579 F.3d 1327 (11th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010) 17, 18, 20, 39
Duhaney v. *Attorney Gen.*, 621 F.3d 340 (3d Cir. 2010), cert. denied, No. 10-9039 (June 6, 2011) 48
Esposito, In re, 21 I. & N. Dec. 1 (B.I.A. 1992) 41
Fernandez-Vargas v. *Gonzales*, 548 U.S. 30 (2006) 45
Fiallo v. *Bell*, 430 U.S. 787 (1977) 49, 52
Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976) 6, 18, 50
Frederick v. *Holder*, 644 F.3d 357 (7th Cir. 2011), petition for cert. pending, No. 11-135 (filed Aug. 1, 2011) 50
G-A-, In re, 7 I. & N. Dec. 274 (B.I.A. 1956) 5, 25, 26, 29
Gabryelsky, In re, 20 I. & N. Dec. 750 (B.I.A. 1993) 41
Galvan v. *Press*, 347 U.S. 522 (1954) 49
Garcia-Lopez v. *Ashcroft*, 334 F.3d 840 (9th Cir. 2003) 48
Gomez-Perez, In re, No. A37 447 529, 2006 WL 901334 (B.I.A. Mar. 1, 2006) 38
Granados, In re, 16 I. & N. Dec. 726 (B.I.A. 1979) 6, 22, 40
Hem v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006) 34
Hernandez-Casillas, In re, 20 I. & N. Dec. 262 (B.I.A. 1990; A.G. 1991) 7, 20, 22
Hussein, In re, No. A26 416 298, 2004 WL 1059601 (B.I.A. Mar. 15, 2004) 36
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 20, 30
INS v. *Doherty*, 502 U.S. 314 (1992) 47
INS v. *St. Cyr*, 533 U.S. 289 (2001) 3, 19, 44, 45

Cases—Continued: Page

Jama v. *Immigration & Customs Enforcement*, 543 U.S. 335 (2005) 3
Jimenez-Santillano, In re, 21 I. & N. Dec. 567 (B.I.A. 1996) 9, 41
Jurado-Gutierrez v. *Greene*, 190 F.3d 1135 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000) 51
Kim v. *Gonzales*, 468 F.3d 58 (1st Cir. 2006) 17
Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 49
Koussan v. *Holder*, 556 F.3d 403 (6th Cir. 2009) 17
L-, In re, 1 I. & N. Dec. 1 (A.G. 1940) 4
LaGuerre v. *Reno*, 164 F.3d 1035 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000) 51
Landon v. *Plasencia*, 459 U.S. 21 (1982) 2, 25
Leng May Ma v. *Barber*, 357 U.S. 185 (1958) 2
Loney, In re, No. A35 770 136, 2004 WL 1167256 (B.I.A. Feb. 10, 2004) 36
Lorillard v. *Pons*, 434 U.S. 575 (1978) 19
Martinez, In re, No. A22 166 294, 2004 WL 1167082 (B.I.A. Feb. 18, 2004) 36
Mascorro-Perales, In re, 12 I. & N. Dec. 228 (B.I.A. 1967) 26
Meza, In re, 20 I. & N. Dec. 257 (B.I.A. 1991) 9, 24, 40, 42
Miller v. *Albright*, 523 U.S. 420 (1998) 52, 53
Montenegro, In re, 20 I. & N. Dec. 603 (B.I.A. 1992) 31, 41
Munoz, In re, No. A35 279 774, 28 Immig. Rptr. B1-1 (B.I.A. Aug. 7, 2003) 36
Negusie v. *Holder*, 129 S. Ct. 1159 (2009) 19

Cases—Continued: Page

Nguyen v. *INS*, 533 U.S. 53 (2001) 53
NLRB v. *Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966) 44
Oceanic Steam Navigation Co. v. *Stranahan*, 214 U.S. 320 (1909) 49
Orrosquieta, In re, No. A92 799 659, 2003 WL 23508672 (B.I.A. Dec. 19, 2003) 36
Patarroyo-Sanchez, In re, No. A42 279 463, 2004 WL 1739093 (B.I.A. June 18, 2004) 37
Paulo v. *Holder*, No. 07-71198, 2011 WL 1663572 (9th Cir. May 4, 2011) 38
Quintero-Salazar v. *Keisler*, 506 F.3d 688 (9th Cir. 2007) 28
Requena-Rodriguez v. *Pasquarell*, 190 F.3d 299 (5th Cir. 1999) 51
Retail, Wholesale & Dep't Store Union v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972) 43
Reyes Manzueta, In re, No. A93 022 672, 2003 WL 23269892 (B.I.A. Dec. 1, 2003) 36
Rodriguez-Cortes, In re, 20 I. & N. Dec. 587 (B.I.A. 1992) 32, 33
Rosario, In re, 15 I. & N. Dec. 416, (B.I.A. 1975) 11
Rowe, In re, No. A37 749 964 (B.I.A. May 9, 1993) 36
Salmon, In re, 16 I. & N. Dec. 734 (B.I.A. 1978) 6, 32
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 43
Silva, In re, 16 I. & N. Dec. 26 (B.I.A. 1976) 6, 50
S-Lei, In re, No. A38 139 424 (B.I.A. May 27, 2004) 36
Shaughnessy v. *Mezei*, 345 U.S. 206 (1953) 49
Stone v. *INS*, 514 U.S. 386 (1995) 47

Cases—Continued: Page

Sweetser, In re, 22 I. & N. Dec. 709 (B.I.A. 1999) 27
T-, In re, 5 I. & N. Dec. 389 (B.I.A. 1953) 5, 22
Tanori, In re, 15 I. & N. Dec. 566 (B.I.A. 1976) 29
Thap v. *Mukasey*, 544 F.3d 674 (6th Cir. 2008) 51
United States v. *Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004) 34, 35
Valere v. *Gonzales*, 473 F.3d 757 (7th Cir. 2007) 39
Vo v. *Gonzales*, 482 F.3d 363 (5th Cir. 2007) 17, 39, 51
Vue v. *Gonzales*, 496 F.3d 858 (8th Cir. 2007) 17, 20
Wadud, In re, 19 I. & N. Dec. 182 (B.I.A. 1984) 6, 7, 29, 40, 41
Zamora-Mallari v. *Mukasey*, 514 F.3d 679 (7th Cir. 2008) 17, 39

Constitution, statutes, regulations and rule:

U.S. Const. Amend. V (Due Process Clause) 17
Administrative Procedure Act, 5 U.S.C. 706(2)(A) 19
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d)(2), 110 Stat. 1277 ..... 8, 19, 53
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 ..... 2, 3, 8, 12, 48
§ 304(b), 110 Stat. 3009-597 ..... 3, 53
Immigration Act of 1917, ch. 29, 39 Stat. 878 4

Statutes, regulations and rule—Continued: Page

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978:
§ 501(a)(3), 104 Stat. 5048 8
§ 501(b), 104 Stat. 5048 12
§ 511(a), 104 Stat. 5052 ..... 32, 53
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1101(a)(43) 8, 24
8 U.S.C. 1101(a)(43) (1988) 8
8 U.S.C. 1101(a)(43) (Supp. II 1990) 8
8 U.S.C. 1101(a)(43) (Supp. III 1991) 33
8 U.S.C. 1101(a)(43)(A) 10, 31, 34, 36
8 U.S.C. 1101(a)(43)(B) (1994) 44
8 U.S.C. 1101(a)(43)(F) 8, 13, 24, 36, 37
8 U.S.C. 1101(a)(43)(G) ..... *passim*
8 U.S.C. 1101(a)(43)(U) 36
8 U.S.C. 1101(a)(48)(B) 8
8 U.S.C. 1158(b)(2)(B)(I) 24
8 U.S.C. 1182(a) (1994) 17
8 U.S.C. 1182(a) (2006 & Supp. III 2009) 3
8 U.S.C. 1182(a)(2)(A)(i)(I) 10, 32, 37
8 U.S.C. 1182(a)(9) (1988) 32
8 U.S.C. 1182(a)(9)(A)(ii) 24
8 U.S.C. 1182(c) (1952) 5
8 U.S.C. 1182(c) (1994) (§ 212(c)) ..... *passim*
8 U.S.C. 1227(a) (2006 & Supp. III 2009) 3, 24
8 U.S.C. 1227(a)(2)(A)(ii) 12, 48

Statutes, regulations and rule—Continued: Page

8 U.S.C. 1227(a)(2)(A)(iii) 12
8 U.S.C. 1229 3
8 U.S.C. 1229a 3
8 U.S.C. 1229a(e)(2) 3
8 U.S.C. 1229b(a)(3) 3, 24, 53
8 U.S.C. 1229b(b)(1)(C) 24
8 U.S.C. 1229c(b)(1)(C) 24
8 U.S.C. 1251(a)(2)(A)(iii) (1994) 44
8 U.S.C. 1251(a)(4) (1988) 12, 31
8 U.S.C. 1251(a)(4)(B) (1988) 7
8 U.S.C. 1251(a)(5) (1982) 7
Reorganization Plan No. V, 54 Stat. 1238 (1939) 4
8 U.S.C. 136(p) (1925) 4
18 U.S.C. 16 8
18 U.S.C. 16(a) 28
8 C.F.R.:
Section 212.3(d) 25, 42
Section 1003.1(d)(3)(ii) 47
Section 1003.1(e)(5) 38
Section 1003.1(g) 35
Section 1212.3(d) 25, 42
Section 1212.3(f)(5) 9, 23
Section 1212.3(h)(3) 48
Sup. Ct. R. 34.5 3

Miscellaneous: Page

56 Fed. Reg. 50,033 (1991) 20
Charles Gordon et al., *Immigration Law and Procedure* (rev. ed. 2011) 34

In the Supreme Court of the United States

No. 10-694

JOEL JUDULANG, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter* but is reprinted in 249 Fed. Appx. 499. The opinions of the Board of Immigration Appeals (Pet. App. 5a-9a) and the immigration judge (Pet. App. 11a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2007. A petition for rehearing was denied on August 26, 2010 (Pet. App. 21a). The petition for a writ of certiorari was filed on November 24, 2010, and granted on April 18, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Before it was repealed, 8 U.S.C. 1182(c) (1994) provided in relevant part as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)).

Other relevant provisions are reprinted in an appendix to petitioner's brief (at 1a-21a).

STATEMENT

1. In the immigration laws, Congress has "long made a distinction between those aliens who have come to our shores seeking admission * * * and those who are within the United States after an entry." *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958). Before 1996, the exclusion or removal of an alien from the United States was accomplished in one of two ways: An alien seeking admission was placed in an "exclusion proceeding," while an alien already present in the United States was placed in a "deportation" proceeding. *Landon* v. *Plasencia*, 459 U.S. 21, 25 (1982). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, made extensive revisions to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Among other things, IIRIRA abolished the distinction between "deportation" and "exclusion" proceedings, and instituted a new form of proceeding known as "removal."

See 8 U.S.C. 1229, 1229a; *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 349 (2005).

Notwithstanding that unified procedure, Congress maintained, as before, two separate lists of the substantive grounds for removal, with one still defining those that render an alien excludable (or, in the term the statute now uses, "inadmissible"), see 8 U.S.C. 1182(a) (2006 & Supp. III 2009), and the other defining those that render an alien "deportable," see 8 U.S.C. 1227(a) (2006 & Supp. III 2009). See also 8 U.S.C. 1229a(e)(2) (specifying that an alien is "removable" if "inadmissible" or "deportable"). Because the lists differ, an alien may be inadmissible without being deportable, and vice versa.

IIRIRA also refashioned the terms on which an alien found to be removable may apply for relief in the Attorney General's discretion. Among other steps, Congress repealed former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994), which had expressly authorized some lawful-permanent-resident aliens (LPRs) domiciled in the United States for seven consecutive years to apply for discretionary relief from certain grounds of exclusion, and, as discussed below, had also been applied to some aliens in deportation proceedings.[1] See IIRIRA § 304(b), 110 Stat. 3009-597. A new form of discretionary relief, known as "[c]ancellation of removal," replaced prior provisions, including Section 212(c); it may be granted "in the case of an alien who is inadmissible or deportable," but it is not available to aliens who have been convicted of aggravated felonies. 8 U.S.C. 1229b(a)(3). In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this

[1] This brief generally refers to "Section 212(c)" by its location within the INA, rather than where it was codified (8 U.S.C. 1182(c)) between 1952 and 1996. Other INA provisions are generally referred to by their United States Code citations. See Sup. Ct. R. 34.5.

Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to certain aliens whose aggravated felony "convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *Id.* at 326.

2. The statutory predecessor to Section 212(c)—the Seventh Proviso to Section 3 of the Immigration Act of 1917, ch. 29, 39 Stat. 878—provided that, notwithstanding mandatory grounds of exclusion, an alien returning to an unrelinquished domicile in the United States of seven years after a temporary absence "may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe." 39 Stat. 878; see 8 U.S.C. 136(p) (1925). That discretion was transferred to the Attorney General in 1939. See Reorganization Plan No. V, 54 Stat. 1238.

In 1940, the Attorney General—in a matter referred to him by the Board of Immigration Appeals (Board or B.I.A.)—invoked the Seventh Proviso in a deportation proceeding. See *In re L-*, 1 I. & N. Dec. 1 (A.G. 1940). The alien had been convicted of larceny in 1924, which did not make him deportable but would make him excludable on an attempt to enter the United States. *Id.* at 4. In 1939, he left the United States and was readmitted by an inspector unaware of the conviction. *Ibid.* In the subsequent deportation proceeding, the Attorney General concluded that the Seventh Proviso could be applied "*nunc pro tunc*," as "little more than a correction of a record of entry," because "the only ground for deportation is one that might have been removed by discretionary action" had the alien been denied admission upon his earlier re-entry. *Id.* at 5-6.

In 1952, Congress replaced the Seventh Proviso with Section 212(c) of the INA, which provided as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)–(25), (30), and (31) of subsection (a) of this section.

8 U.S.C. 1182(c) (1952). Section 212(c) contained three limits that had not been present in the Seventh Proviso: (1) it required the alien to be an LPR; (2) it required the temporary absence to be voluntary and not under a deportation order; and (3) it limited the waiver power to certain enumerated grounds of exclusion in Section 1182(a).

As with the Seventh Proviso, the Board applied Section 212(c) to some LPRs in deportation proceedings, on a *nunc-pro-tunc* basis, when they had previously reentered the United States and would have been eligible for relief from exclusion. See *In re G-A-*, 7 I. & N. Dec. 274, 275 (B.I.A. 1956). The Board nevertheless recognized that, under Section 212(c), relief was "no longer a discretion which may be used generally," and was "confined" to "enumerated" "grounds of inadmissibility." *In re T-*, 5 I. & N. Dec. 389, 390 (B.I.A. 1953). Thus, aliens being deported on grounds that were not comparable to enumerated grounds of inadmissibility were ineligible for Section 212(c) relief. See, *e.g.*, *ibid.* (deportable for having entered without inspection). The Board also refused to extend Section 212(c) to aliens in deportation proceedings who had not left and re-entered the United

States after they became deportable. See, *e.g.*, *In re Arias-Uribe*, 13 I. & N. Dec. 696 (B.I.A. 1971), aff'd, 466 F.2d 1198 (9th Cir. 1972).

In *Francis* v. *INS*, 532 F.2d 268 (1976), the Second Circuit held that the Board's practice of making Section 212(c) relief available on a *nunc-pro-tunc* basis to deportable aliens who had departed and re-entered the United States, but not to deportable aliens who had remained here, constituted an equal-protection violation. It found no rational basis to distinguish between "two classes of aliens identical in every respect except for the fact that members of one class have departed and returned to this country at some point after they became deportable." *Id.* at 272.

Shortly after the Solicitor General decided against seeking certiorari in *Francis*, the Board acquiesced in the decision on a nationwide basis. In *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976), it concluded that Section 212(c) relief could be granted to an LPR "in a deportation proceeding regardless of whether he departs the United States following the act or acts which render him deportable." *Id.* at 29-30.

3. After *Silva*, the Board continued to find that Section 212(c) applies in a deportation proceeding only when the ground of deportation is comparable to an enumerated ground of inadmissibility. See *In re Granados*, 16 I. & N. Dec. 726, 728 (B.I.A. 1979). Thus, when an LPR was deportable on the charge of having committed a crime involving moral turpitude within five years of entry, the Board found he was eligible for relief, because having committed a crime involving moral turpitude was "also a ground of inadmissibility." *In re Salmon*, 16 I. & N. Dec. 734, 736-737 (B.I.A. 1978). By contrast, the LPR in *In re Wadud*, 19 I. & N. Dec. 182 (B.I.A. 1984),

was charged with being deportable under 8 U.S.C. 1251(a)(5) (1982) (for a conviction relating to fraud and misuse of visas or other entry permits). 19 I. & N. Dec. at 183. Because there was "no comparable ground of excludability" for that ground of deportation, the Board found it immaterial whether the underlying conviction was "one involving moral turpitude." *Id.* at 185. It "decline[d] to expand the scope of section 212(c) relief in cases where the ground of deportability charged is not also a ground of inadmissibility." *Ibid.*

In 1990, the Board attempted to eliminate the requirement that the ground of deportability be comparable to a ground of exclusion, but the Attorney General disapproved its opinion. See *In re Hernandez-Casillas*, 20 I. & N. Dec. 262 (B.I.A. 1990; A.G. 1991).[2] Without "evaluating the correctness of" the equal-protection rationale of *Francis* and *Silva*, the Attorney General concluded that "deviation from the literal terms of section 212(c)" should be kept "to what [those cases] understood as the constitutionally mandated minimum," which was "only that discretionary relief * * * be made available in deportation proceedings in which the asserted ground for deportation is also a ground for exclusion expressly subject to waiver under that section." *Id.* at 287-288.

4. Congress made having an aggravated-felony conviction a ground of deportability in 1988. See 8 U.S.C. 1251(a)(4)(B) (1988). At the time, it defined "aggravated felony" to include murder, certain drug- and weapons-trafficking offenses, and related attempts and conspira-

---

[2] The Board's approach in *Hernandez-Casillas* would still have denied eligibility where the ground of deportation was "comparable to the exclusion grounds expressly excluded by section 212(c)." 20 I. & N. Dec. at 266.

cies. 8 U.S.C. 1101(a)(43) (1988). In the Immigration Act of 1990 (1990 Act), Congress added money-laundering offenses and "any crime of violence (as defined in [18 U.S.C. 16] * * *) for which the term of imprisonment imposed * * * is at least 5 years." Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 5048; 8 U.S.C. 1101(a)(43) (Supp. II. 1990).[3] Congress expanded the definition substantially further in 1994 and 1996. As relevant here, IIRIRA reduced the term-of-imprisonment threshold for a "crime of violence" from five years to one year (whether or not that term was suspended). 8 U.S.C. 1101(a)(43)(F) and (48)(B). And it expressly made the new definition applicable "regardless of whether the conviction was entered before, on, or after September 30, 1996." 8 U.S.C. 1101(a)(43).

As Congress expanded the definition of aggravated felony, it also limited the availability of Section 212(c) relief. In 1990, it made Section 212(c) inapplicable to any alien who was convicted of an aggravated felony and served a term of imprisonment of at least five years. See 8 U.S.C. 1182(c) (1994). In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d)(2), 110 Stat. 1277, it expanded that bar to include any aggravated-felony conviction, irrespective of the length of the sentence served. Finally, IIRIRA repealed Section 212(c). See p. 3, *supra*.

---

[3] A "crime of violence" is defined in 18 U.S.C. 16 as follows:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

5. In 1991, two months after the Attorney General's decision in *Hernandez-Casillas* reaffirmed that Section 212(c) was available in a deportation proceeding only when the deportation ground had a comparable ground of exclusion, the Board applied that standard to an aggravated-felony charge. In *In re Meza*, 20 I. & N. Dec. 257 (B.I.A. 1991), the alien had been convicted of a drug-related aggravated felony. The Board noted there was no "aggravated felony" ground of exclusion, but it looked to the "specific category of aggravated felony at issue in th[e] case," and found that it comprised "trafficking offenses, most, if not all, of which would also be encompassed within" the ground of exclusion applicable to aliens convicted of drug trafficking (or believed to be drug traffickers). *Id.* at 259. It therefore held that the alien was "not precluded from establishing eligibility for section 212(c) relief." *Ibid.* Until Section 212(c)'s repeal, the Board's precedential decisions continued to find that relief was unavailable when a deportation ground did not have "a statutory counterpart among the exclusion grounds waivable by section 212(c)." *In re Jimenez-Santillano*, 21 I. & N. Dec. 567, 574 (B.I.A. 1996) (en banc).

In 2004, in response to this Court's decision in *St. Cyr* finding that former Section 212(c) remained available to some aliens in post-IIRIRA proceedings, the Department of Justice promulgated regulations providing procedures for handling Section 212(c) claims. Those regulations specify that relief is not available when "[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act." 8 C.F.R. 1212.3(f)(5).

In 2005, the Board decided two cases that applied the statutory-counterpart rule to the definition of "aggravated felony." The alien in *In re Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005), remanded, 489 F.3d 88 (2d Cir. 2007), was found to be deportable (and thus removable) as an alien convicted of sexual abuse of a minor, which is an aggravated felony under 8 U.S.C. 1101(a)(43)(A). The alien contended that that ground was comparable to the ground of exclusion for crimes involving moral turpitude (8 U.S.C. 1182(a)(2)(A)(i)(I)), but the Board found that "the moral turpitude ground of exclusion addresses a distinctly different and much broader category of offenses than the aggravated felony sexual abuse of a minor charge." 23 I. & N. Dec. at 728.

In *In re Brieva-Perez*, 23 I. & N. Dec. 766 (B.I.A. 2005), petition for review denied, 482 F.3d 356 (5th Cir. 2007), the alien was found to be deportable (and thus removable) on account of a conviction of a crime of violence. In considering Section 212(c) eligibility, the Board explained that "the relevant question is whether the 'crime of violence' aggravated felony ground * * * is substantially equivalent to a ground of inadmissibility in section 212(a) of the Act." *Id.* at 772. Upon analyzing the definition of "crime of violence," and observing that "[s]ome of the most common crimes falling within [that] definition * * * do not necessarily involve moral turpitude," the Board found that the category was not substantially equivalent to the crime-involving-moral-turpitude ground of inadmissibility. *Id.* at 772-773.

In 2007, the Second Circuit reviewed the Board's decision in *Blake*. See *Blake* v. *Carbone*, 489 F.3d 88 (2d Cir. 2007). The court rejected the argument that the decision had an impermissible retroactive effect, because the 2004 regulations had done "nothing more than

crystallize the agency's preexisting body of law." *Id.* at 98. The court nonetheless granted the alien's petition for review, holding, in light of *Francis*, that Section 212(c) eligibility should not turn on how the alien's "offense was categorized as a ground of deportation," but instead on the "particular criminal offense[]" itself. *Id.* at 102-103. "If the offense that renders [an LPR] deportable would render a similarly situated [LPR] excludable, the deportable [LPR] is eligible for a waiver of deportation." *Id.* at 103. The court recognized that its reading conflicted with that of "several other circuits," and that "much of th[e] confusion" about Section 212(c) could be attributed in "hindsight" to the decision in *Francis*, but it found itself "bound to finish what our predecessors started." *Id.* at 103, 105. It remanded for a determination of whether the alien's conviction could "form the basis of exclusion as a crime involving moral turpitude." *Id.* at 105.

6. a. Petitioner was born in the Philippines in 1966 and admitted for lawful permanent residence upon entry to the United States in 1974. Pet. App. 2a, 14a, 37a.

In 1988, the Los Angeles District Attorney filed an information in California state court charging petitioner with one count of murder and one count of attempted murder. Administrative Record (A.R.) 152-154. Petitioner pleaded guilty to a lesser-included offense of voluntary manslaughter and received a suspended sentence of six years of imprisonment and four years of probation, conditioned on his spending 684 days in county jail. Pet. App. 4a, 15a, 31a-32a.

Voluntary manslaughter was generally recognized as a crime involving moral turpitude. See, *e.g.*, *In re Rosario*, 15 I. & N. Dec. 416, 417 (B.I.A. 1975). But petitioner's conviction did not make him deportable then,

because the relevant ground applied to a conviction of "a crime involving moral turpitude committed *within five years after entry*," or to convictions "at any time after entry * * * of *two* crimes involving moral turpitude." 8 U.S.C. 1251(a)(4) (1988) (emphases added). In 1996, however, IIRIRA expanded the "crime of violence" portion of the aggravated-felony ground of deportability and made it retroactively applicable. See p. 8, *supra*.[4]

In 2003, petitioner was charged in California state court with two counts of grand theft of personal property valued at more than $400, based on allegations that he had stolen and pawned two diamond rings. A.R. 143, 146. Petitioner pleaded guilty to one count, and was sentenced to 32 months of imprisonment and ordered to pay $9250 in restitution. Pet. App. 14a; A.R. 144.

b. In 2005, while petitioner was still incarcerated, the Department of Homeland Security (DHS) placed him in removal proceedings on the charge that he was deportable under 8 U.S.C. 1227(a)(2)(A)(iii) as an alien who had been convicted of an aggravated felony (specifically, "a theft offense" for which the term of imprisonment was at least one year, 8 U.S.C. 1101(a)(43)(G)). Pet. App. 11a-13a. DHS later lodged two additional charges of removability that depended on petitioner's 1989 voluntary-manslaughter conviction. *Id.* at 33a-34a. One charged that petitioner had been convicted of "two or more crimes involving moral turpitude," which would make him deportable under 8 U.S.C. 1227(a)(2)(A)(ii). The other charged petitioner with being deportable under 8 U.S.C. 1227(a)(2)(A)(iii), because he had been convicted of an aggravated felony (specifi-

[4] Petitioner's conviction preceded the 1990 addition of "crime of violence," which applied only prospectively. See 1990 Act § 501(b), 104 Stat. 5048.

cally, a "crime of violence" for which the term of imprisonment was at least one year, 8 U.S.C. 1101(a)(43)(F)).

On September 28, 2005, after a hearing, an immigration judge (IJ) ruled that petitioner was subject to removal on all three charged grounds. Pet. App. 14a-16a. The IJ further concluded that petitioner was "not eligible for any forms of relief," including under Section 212(c), and ordered him removed to the Philippines. *Id.* at 16a-17a.

c. On February 3, 2006, the Board dismissed petitioner's appeal. Pet. App. 5a-9a. It found that the evidence did not support his claim to have obtained derivative United States citizenship through his parents. *Id.* at 6a-7a. The Board also determined that petitioner's 1989 conviction for voluntary manslaughter rendered him removable, and that he was ineligible for discretionary relief from removal under former Section 212(c) because "the 'crime of violence' aggravated felony category has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act." *Id.* at 8a (citing *Brieva-Perez*). Having determined that petitioner's manslaughter conviction was "sufficient, standing alone, to render him removable and ineligible for relief," the Board found it unnecessary to determine "whether his 2003 grand theft conviction would also constitute a valid factual predicate for deportability." *Id.* at 9a.[5]

---

[5] Petitioner has argued that his 2003 grand-theft conviction should not qualify as an aggravated felony under 8 U.S.C. 1101(a)(43)(G). See Pet. 16 n.10; Pet. C.A. Br. 37-39; A.R. 8-16. He has not, however, contested that his 1989 voluntary-manslaughter conviction was a crime-of-violence aggravated felony under 8 U.S.C. 1101(a)(43)(F). See Pet. App. 8a. And he has not suggested that either conviction fails to qualify as a crime involving moral turpitude.

7. Petitioner sought judicial review of the Board's decision, and the Ninth Circuit denied his petition for review. Pet. App. 1a-4a. As relevant here, the court concluded that petitioner's challenge to the Board's holding that he was ineligible for Section 212(c) relief under the statutory-counterpart rule was foreclosed by the panel decision in *Abebe* v. *Gonzales*, 493 F.3d 1092, 1104-1105 (2007), reh'g granted, 514 F.3d 909 (2008), superseded on reh'g, 554 F.3d 1203 (9th Cir. 2009) (en banc), cert. denied, 130 S. Ct. 3272 (2010). In *Abebe*, the panel sustained the Board's application of the statutory-counterpart rule in *Blake* and *Brieva-Perez*, finding that the Board's approach is supported by a rational basis and that it does not give rise to retroactivity concerns, because "the BIA's published cases * * * have consistently held § 212(c) relief to be unavailable to aliens deportable on grounds that lack comparable grounds of exclusion whether or not their conduct could also be characterized as involving moral turpitude." *Id.* at 1104-1105. In light of *Abebe*, the court held that "[t]he aggravated felony/crime of violence ground for deportation is not substantially similar to any ground for exclusion in the former § 212(a)." Pet. App. 4a (citing *Brieva-Perez*).

Petitioner sought rehearing. After he did so, the *Abebe* panel decision was superseded by an en banc decision that rested on different reasoning but still rejected challenges to the Board's application of its statutory-counterpart rule. See *Abebe* v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010). After the en banc proceedings had concluded (and after this Court had denied certiorari) in *Abebe*, the court of appeals denied petitioner's rehearing petition. Pet. App. 21a.

SUMMARY OF ARGUMENT

A. The Board's statutory-counterpart rule is entitled to deference because it reflects a reasonable construction of the statute.

1. Because Section 212(c) expressly authorizes the waiver only of grounds of inadmissibility, the Board has reasonably required, in the context of a deportation proceeding, that there be a categorical similarity between the charged ground of deportability and a waivable ground of inadmissibility.

2. The Board reasonably concluded that the ground of deportability here (a crime-of-violence aggravated felony) is not comparable to the ground of inadmissibility petitioner invokes (a crime involving moral turpitude). Those categories overlap but they are not identical. Many common crimes of violence are often not treated as morally turpitudinous in the absence of aggravating factors.

3. The statutory-counterpart rule does not make Section 212(c) eligibility depend on travel abroad, but rather on whether an alien has been charged with being inadmissible or deportable. Petitioner's contrary argument depends on an obsolete understanding of *nunc-pro-tunc* relief.

B. The Board's 2005 cases applying the statutory-counterpart rule to aggravated-felony grounds of deportability did not reflect a change in the law.

1. Before 2005, there were no precedential opinions of the Board (or the courts of appeals) holding that a crime-of-violence aggravated felony satisfied the statutory-counterpart rule. The cases petitioner identifies as holding to the contrary either failed to address the question or were unpublished and nonprecedential.

2. More generally, the Board had long used a grounds-based approach to analyze comparability, under which it evaluated whether an alien's ground of deportability was comparable to a ground of exclusion. It had repeatedly rejected requests (like petitioner's) to analyze instead whether the conviction underlying a ground of deportability would also happen to trigger a ground of inadmissibility.

C. The Board's application of the statutory-counterpart rule is not impermissibly retroactive. Its 2005 cases did not reflect an abrupt reversal of prior practice, but rather the application of pre-existing general principles to a specific context. Moreover, petitioner cannot show reliance on the basis of his guilty plea because he was not even deportable at the time of his conviction, and thus had no need to rely on the statutory-counterpart rule for Section 212(c) relief. And petitioner's approach would increase costs to the government and lead to delays.

D. The Board's interpretation does not raise equal-protection concerns. The statutory-counterpart rule does not distinguish between deportable aliens on the basis of whether they have traveled abroad, and it is not irrational for the Board to distinguish between inadmissible and deportable aliens on a categorical basis. Making discretionary relief available on more favorable terms during an admissibility inquiry creates an incentive for deportable aliens to bring themselves to the attention of immigration officials. There is thus a facially legitimate and bona fide reason for the rule. Even if there were equal-protection concerns, the appropriate remedy would be to limit rather than expand Section 212(c)'s applicability to deportable aliens with aggravated-felony convictions.

ARGUMENT

THE DEPARTMENT OF JUSTICE HAS REASONABLY DECLINED TO EXTEND SECTION 212(c) ELIGIBILITY TO ALIENS WHOSE GROUND OF DEPORTABILITY IS NOT COMPARABLE TO ANY GROUND OF INADMISSIBILITY

Petitioner concedes he is deportable. But he contends he should be eligible for relief under former Section 212(c), which, by its terms, was available to allow the discretionary waiver of only certain grounds of exclusion contained in 8 U.S.C. 1182(a) (1994). (Since 1996, Section 1182(a) has called them grounds of "inadmissibility.") With the exception of the Second Circuit, every court of appeals to have addressed the issue has upheld the Board's application of its statutory-counterpart rule as a reasonable interpretation of Section 212(c) that does not raise retroactivity concerns or violate the equal-protection component of the Fifth Amendment's Due Process Clause. See, *e.g.*, *Kim* v. *Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); *Caroleo* v. *Gonzales*, 476 F.3d 158, 162-163 (3d Cir. 2007); *Vo* v. *Gonzales*, 482 F.3d 363, 371-372 (5th Cir. 2007); *Koussan* v. *Holder*, 556 F.3d 403, 412-414 (6th Cir. 2009); *Zamora-Mallari* v. *Mukasey*, 514 F.3d 679, 691-692 (7th Cir. 2008); *Vue* v. *Gonzales*, 496 F.3d 858, 860-862 (8th Cir. 2007); *Aguilar-Ramos* v. *Holder*, 594 F.3d 701, 706 (9th Cir. 2010); *De la Rosa* v. *Attorney Gen.*, 579 F.3d 1327, 1335-1340 (11th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010); but see *Blake* v. *Carbone*, 489 F.3d 88, 103-104 (2d Cir. 2007).[6]

---

[6] The Tenth Circuit has upheld the Board's approach in unpublished decisions. See, *e.g.*, *Alvarez* v. *Mukasey*, 282 Fed. Appx. 718, 723 (2008).

Like the Board and the Attorney General, nearly all of those courts have acquiesced in the Second Circuit's conclusion in *Francis* v. *INS*, 532 F.2d 268 (1976), that, in light of equal-protection concerns, Section 212(c) eligibility should not turn solely on whether an LPR in deportation proceedings has previously left and re-entered the United States.[7] But the statutory-comparability rule that petitioner challenges has long co-existed with *Francis*, precisely because it makes eligibility turn on something other than prior travel. The rule ensures that an alien found to be *deportable* on a particular ground is sufficiently comparable to an *inadmissible* alien to warrant the application of Section 212(c). It is therefore faithful to Section 212(c)'s reference to waiving certain grounds of inadmissibility.

The great majority of the courts of appeals have recognized that the earlier step away from the statutory terms licensed by *Francis* does not warrant the substantial additional step that petitioner now urges. See, *e.g.*, *De la Rosa*, 579 F.3d at 1340 ("Extending [the statute's applicability] once does not empower a court to extend it *ad infinitum*, without any foundation in the statute or case law.").

This Court, too, should decline to find that the statute compels the Board to take that additional step.

A. The Board's Statutory-Counterpart Rule Reflects A Reasonable Application Of The Statute

It is well established that "the BIA is entitled to [*Chevron*] deference in interpreting ambiguous provi-

---

[7] The only exception is the Ninth Circuit, which has concluded that constitutional avoidance did not justify its earlier decisions following *Francis*. See *Abebe* v. *Mukasey*, 554 F.3d 1203, 1205-1207 (2009) (en banc), cert. denied, 130 S. Ct. 3272 (2010).

sions of the INA." *Negusie* v. *Holder*, 129 S. Ct. 1159, 1163 (2009). Thus, if Congress has "directly spoken to the precise question at issue," "that is the end of the matter," but if the statute is "silent or ambiguous with respect to the specific issue," the agency's interpretation must be upheld if it is "a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). Petitioner concedes the applicability of that framework by acknowledging (Br. 44 n.16) that *Chevron*'s second step is the "same" as the standard he urges in the course of arguing that the Board's position is "arbitrary and capricious" under the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

Although Section 212(c), by its terms, permitted the Attorney General to waive only certain enumerated grounds of exclusion (or inadmissibility), this Court has previously recognized the Board's longstanding practice of allowing certain aliens "to apply for a discretionary waiver from deportation." *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). Moreover, Congress was undoubtedly aware of the Board's practice of applying Section 212(c) to at least some categories of aliens in deportation proceedings, but it neither codified nor limited that specific practice for several decades. Cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

In 1996, however, Congress amended the text of Section 212(c) so that it would not be available to aliens who are "*deportable by reason of* having committed any criminal offense covered in" several grounds of deportability (including the aggravated-felony ground). AEDPA § 440(d)(2), 110 Stat. 1277 (emphasis added). That refer-

ence constituted a strong indication that Section 212(c) relief was available to at least some aliens in deportation proceedings.[8] Nevertheless, because that amendment merely cut off relief to one category of aliens in such proceedings (*i.e.*, those deportable by reason of certain crimes), it still did not speak to the viability of the Board's long-established statutory-counterpart rule, or to its specific contours.

As a result, former Section 212(c) is "ambiguous with respect to [that] specific issue," *Chevron*, 467 U.S. at 843, and the Board is entitled to deference in applying the statutory-counterpart rule and thus "giv[ing] ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (internal quotation marks omitted). See *De la Rosa*, 579 F.3d at 1335, 1340 (applying *Chevron* in upholding statutory-counterpart rule); *Vue*, 496 F.3d at 859-860 (same); *Caroleo*, 476 F.3d at 16[illegible] 168 (same).[9]

---

[8] Petitioner describes (Br. 29-30) two 1990 statutory changes as being "predicated on the availability of Section 212(c) relief in deportation proceedings." Neither of those changes was limited to aliens in deportation proceedings, leaving some doubt whether Congress had squarely ratified Section 212(c)'s applicability in deportation proceedings. See *In re Hernandez-Casillas*, 20 I. & N. Dec. 262, 291 n.14 (A.G. 1991); but see 56 Fed. Reg. 50,033 (1991) (preamble to INS rulemaking stating that one of the amendments showed that "Congress explicitly recognized the applicability of section 212(c) relief to deportation proceedings").

[9] Although the Second Circuit declined to apply *Chevron* in *Blake* v. *Carbone*, its reasons were unpersuasive. The court suggested (489 F.3d at 100) that the statute is unambiguous in its *in*applicability to LPRs who are "deportees" when they seek Section 212(c) relief, because the statute applies to an LPR "who temporarily proceeded abroad voluntarily and not under an order of deportation," 8 U.S.C. 1182(c) (1994).

1. Given the statute's reference to waiving grounds of inadmissibility, it is reasonable to require an alien's charged ground of deportability to be categorically comparable to a ground of inadmissibility before it can be waived

Petitioner contends (Br. 45) that "[t]here is no reason to believe that a comparison between" Congress's descriptions of "who is excludable and deportable" should determine who is "eligible for relief under Section 212(c)." In his view, any alien in a deportation proceeding who would also be excludable on the basis of the same conviction should be eligible for Section 212(c) relief. But Section 212(c) itself was phrased in terms of waiving statutorily specified grounds of exclusion, and the Attorney General and the Board have reasonably concluded that the statute's language should not be construed to be as elastic as petitioner would have it—that there must be a closer connection between a charge of deportability that initiates a proceeding and the ground of inadmissibility that could justify the exercise of discretionary relief at the end of that proceeding.

But the concluding phrase, referring to being "under an order of deportation," explained the "voluntar[y]" nature of the travel that preceded the admissibility decision, and did not necessarily bar relief to all aliens "under an order of deportation." Petitioner, of course, does not embrace the Second Circuit's view that he "clearly fall[s] outside the statute's reach." 489 F.3d at 100. The court also said it would not defer to the agency because the statutory-counterpart rule is "a creature of constitutional avoidance" born of the court's decision in *Francis*. *Ibid.* As discussed below, however, the statutory-counterpart rule is distinct from *Francis*'s concern about the mere presence or absence of foreign travel, and nearly all of petitioner's arguments are independent of his suggestion (Br. 51-53) of constitutional doubt—which, in any event, depends on there being ambiguity in the statute. The Board is entitled to deference if its construction is reasonable.

a. Although the Board has long made Section 212(c) relief available to *some* aliens in deportation proceedings, it has also repeatedly recognized that Section 212(c) relief cannot be divorced altogether from the statutory text. Shortly after the INA was enacted, the Board acknowledged that Section 212(c) was narrower than its predecessor, such that its authorization was "no longer a discretion which may be used generally," but was "confined to the grounds of inadmissibility enumerated" in certain paragraphs of Section 212(a). *In re T-*, 5 I. & N. Dec. 389, 390 (B.I.A. 1953). Even after the Board acquiesced on a nationwide basis in the Second Circuit's decision in *Francis*, *supra*, the Board continued to recognize that *Francis* had "not increase[d] the *statutory grounds* to which section 212(c) relief may be applied." *In re Granados*, 16 I. & N. Dec. 726, 728 (B.I.A. 1979) (emphasis added).

At the one point when the Board decided to depart from its previous course and adopt a more permissive interpretation, the Attorney General reversed the Board, expressly stating that "the Attorney General may not waive a ground for deportation if it is not a ground for exclusion at all," and that lifting that limit "would take immigration practice even further from the statutory text, which refers only to grounds for exclusion." *In re Hernandez-Casillas*, 20 I. & N. Dec. 262, 287 (A.G. 1991). Thus, *Hernandez-Casillas* held that Section 212(c) relief would "be made available in deportation proceedings in which the asserted ground for deportation *is also a ground for exclusion* expressly subject to waiver under that section." *Id.* at 288 (emphasis added).

That was a reasonable construction of the statute, which was codified in the 2004 regulations stating that

relief under former Section 212(c) is not available when "[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act." 8 C.F.R. 1212.3(f)(5). The 2005 Board decisions to which petitioner objects are a straightforward application of that approach in the context of the aggravated-felony ground of deportability that was first added in 1988 and repeatedly expanded between 1990 and 1996. As the Board explained in *In re Brieva-Perez*, 23 I. & N. Dec. 766 (B.I.A. 2005), petition for review denied, 482 F.3d 356 (5th Cir. 2007): "[T]he relevant question is whether the 'crime of violence' aggravated felony ground * * * is substantially equivalent to a ground of inadmissibility in section 212(a) of the Act." *Id.* at 772.

In other words, the Board has determined that when a statutory ground of deportability is not categorically comparable to a statutory ground of exclusion, a deportation proceeding is not sufficiently analogous to an exclusion proceeding to warrant a waiver that, by its terms, is tied to grounds of inadmissibility. That conclusion represents a reasonable interpretation of the statutory language in light of its long history of administrative and judicial implementation.

b. Petitioner contends (Br. 46) it is "particularly irrational" of the Board to "compare[] the language of the exclusion provision (INA § 212(a)) not to the language of the relevant *deportation provision* itself (INA § 237(a)), but to the *subcategory* of 'aggravated felony' listed in the INA's general definitions provision." Petitioner suggests (Br. 37) that "the relevant comparator" should instead be "the deportation provision's" generic reference to "aggravated felony."

It is, however, quite reasonable for the Board to have considered the aggravated-felony definition in subcategories—as it has consistently done since its first precedential opinion involving application of the statutory-counterpart rule to the then-relatively-new definition of aggravated felony. See *In re Meza*, 20 I. & N. Dec. 257, 259 (B.I.A. 1991). That approach simply takes account of the fact that Congress chose to set forth an extensive definition of the term once, in Section 1101(a)(43), so that it can be used throughout the INA without having to re-itemize each subpart of the definition at each place the term "aggravated felony" appears in the INA, including in the list of grounds of deportability in Section 1227(a).[10] Any insistence to the contrary would exalt form over substance. In practical terms, an alien is charged with being deportable based on a specific subcategory (or subcategories) of the aggravated-felony definition, and DHS must prove deportability with respect to that specific part of the definition. See, *e.g.*, Pet. App. 5a, 11a-12a (listing charges against petitioner; specifying that one aggravated-felony charge is "as defined in" Section 1101(a)(43)(G) and the other is "as defined in" Section 1101(a)(43)(F)).

c. Petitioner contends (Br. 35, 36 n.12, 49) that the Board's insistence on a match between the ground of deportability and a ground of exclusion articulated in the statute itself is inconsistent with the Board's practice of extending relief from a ground of exclusion, *once granted*, to grounds of deportability. It is true that the Justice Department has specified, first in Board deci-

---

[10] Many other INA provisions rely on the aggravated-felony definition. See, *e.g.*, 8 U.S.C. 1158(b)(2)(B)(I) (asylum), 1182(a)(9)(A)(ii) (readmission following removal), 1229b(a)(3) and (b)(1)(C) (cancellation of removal), 1229c(b)(1)(C) (voluntary departure).

sions, and then in regulations, that a waiver may be valid with respect to grounds of deportability as well as exclusion. See, *e.g.*, *In re G-A-*, 7 I. & N. Dec. 274, 275 (B.I.A. 1956) ("[I]f [Section 212(c)] is exercised to waive a ground of inadmissibility based upon a criminal conviction, a deportation proceeding cannot thereafter be properly instituted based upon the same criminal conviction unless, of course, the Attorney General has revoked the previous grant of relief."); 8 C.F.R. 212.3(d), 1212.3(d).[11] But petitioner overstates the logical import of that practice. There is a clear difference between deciding, on one hand, that the waiver of a ground of exclusion that has already been granted will have the effect of waiving a comparable deportation ground, and refusing, on the other hand, to waive in the first instance a ground of deportability that is insufficiently like a ground of inadmissibility to comport with the statute.

Petitioner further contends (Br. 49-50) that the Board's statutory-counterpart rule would "absurd[ly] and unfair[ly]" allow an alien to receive Section 212(c) relief "from *exclusion* because of a conviction," but still be susceptible to "a deportation charge * * * based on the same conviction and brought the very next day."

---

[11] It is possible to conceive of a system in which the grant of a Section 212(c) waiver for a returning LPR did not prevent the government from seeking deportation on similar grounds. Congress could well think that an LPR who is both inadmissible and deportable should not remain in the country indefinitely, even if he could be allowed to return to his U.S. domicile before being subject to deportation proceedings, thus giving him an opportunity to organize his affairs and making him "the beneficiary of the procedural protections and the substantive rights" associated with deportation (but not exclusion) hearings. *Landon* v. *Plasencia*, 459 U.S. 21, 27 (1982). Nevertheless, it was reasonable for the Board to determine, long ago, that a waiver, once it was actually granted, would be more durable.

Petitioner claims that possibility is foreclosed by Board decisions (Br. 35, 49), but the cases he cites involved grounds of deportability with comparable grounds of exclusion. *In re Balderas*, 20 I. & N. Dec. 389, 390 (B.I.A. 1991) (crimes involving moral turpitude); *In re Mascorro-Perules*, 12 I. &. N. Dec. 228 (B.I.A. 1967) (same); *G-A-*, 7 I. & N. Dec. at 275 (drug conviction). They therefore did not address whether a non-comparable ground of deportability could be waived, and one of them (*Balderas*) expressly noted the statutory-counterpart requirement, 20 I. & N. Dec. at 390 n.1. Moreover, although petitioner's hypothetical result is possible, any alien who has actually received a favorable exercise of discretion under Section 212(c) would—in the absence of new, or previously undisclosed, grounds of deportability—be unlikely to be subjected to a new removal proceeding, the initiation of which would require another exercise of discretion.

2. In applying a grounds-based approach, it is reasonable to distinguish crimes of violence from crimes involving moral turpitude

Petitioner criticizes the Board's implementation of the categorical, grounds-based comparison only glancingly, asserting (Br. 46-47 n.17) that "it is hard to imagine that there are many *aggravated felonies* that are crimes of *violence* * * * that somehow involve no moral turpitude or are petty offenses." The Board acknowledged there is overlap between the two categories, but it properly recognized that there are in fact crimes of violence that do not involve moral turpitude, which prevents the two grounds from being categorically comparable. *Brieva-Perez*, 23 I. & N. Dec. at 772.

The Board observed that the offense at issue in *Brieva-Perez* (unauthorized use of a motor vehicle) was "not generally considered a crime involving moral turpitude," even though it *was* "an aggravated felony crime of violence" (because "the nature of the offense" involved a substantial risk that physical force would be used to cause damage to property). 23 I. & N. Dec. at 770, 772. The Board explained that the same thing was true for "[s]ome of the most common crimes falling within the definition of a 'crime of violence,'" given that burglary and assault offenses, in the absence of aggravating factors, are often not treated as morally turpitudinous. *Id.* at 772.

The Board was well-situated to evaluate the degree of overlap between the two categories, as it routinely applies both definitions in individual immigration cases and knows that the inquiries are distinct. For instance, in *In re Sweetser*, 22 I. & N. Dec. 709 (B.I.A. 1999) (en banc), it was undisputed that the offense in question (criminally negligent child abuse) "was not a crime involving moral turpitude." *Id.* at 710. Yet the Board needed to conduct in-depth categorical analysis of the relevant state statute before it could determine that the offense was not a crime-of-violence aggravated felony. *Id.* at 712-717.

It was therefore reasonable for the Board to conclude, in comparing the crime-of-violence ground of deportability with the crime-involving-moral-turpitude ground of inadmissibility, that those grounds are not sufficiently alike as a categorical matter to warrant the

extension of Section 212(c) to provide discretion to waive the ground of deportability.[12]

3. *The statutory-counterpart rule does not make Section 212(c) eligibility depend solely on whether an alien has left the United States*

Petitioner contends (Br. 47) that the Board's application of the statutory-counterpart rule is "arbitrary" because it "recreates the * * * distinction based on travel abroad that the BIA abandoned years ago in *Silva*." That contention is based on petitioner's statement (Br. 47) that "[t]here is no question that LPRs with excludable convictions who travel abroad and reenter are eligible for Section 212(c) relief *nunc pro tunc* in later-commenced deportation proceedings." See also Pet. Br. 51 ("*Blake* * * * revived the distinction between LPRs in deportation proceedings who previously traveled abroad (who can seek relief *nunc pro tunc*) and LPRs who did not."). In drawing those conclusions, petitioner assumes that such an LPR could qualify for *nunc-pro-tunc* Section 212(c) relief without satisfying

---

[12] See *Dalombo Fontes* v. *Gonzales*, 483 F.3d 115, 123 (1st Cir. 2007) ("Aggravated felonies and crimes of violence are both categories of crimes or types of crimes; depending on the scope of the phrase 'moral turpitude,' it would include some but not necessarily all of those crimes and would surely encompass others not on the list of defined crimes.") (citations omitted), cert. denied, 553 U.S. 1055 (2008); *Calderon-Minchola* v. *Attorney Gen.*, 258 Fed. Appx. 425, 428-429 (3d Cir. 2007) (finding that crimes of violence in 18 U.S.C. 16(a) "would appear to require none of the vileness, depravity, or reprehensible acts deliberately committed that we have held are characteristic of moral turpitude"); cf. *Quintero-Salazar* v. *Keisler*, 506 F.3d 688, 692-694 & n.4 (9th Cir. 2007) (finding that, although California statutory-rape offense was "crime of violence" under Sentencing Guidelines, it was not "crime of moral turpitude" for immigration purposes).

the statutory-counterpart rule. In support, he cites only the Board's 1956 decision in *G-A-*, *supra*.

Petitioner's assumption, however, about the interaction of *nunc-pro-tunc* relief and comparable-grounds analysis was nullified more than 25 years ago. In *In re Wadud*, 19 I. & N. Dec. 182 (1984), the Board described *In re Tanori*, 15 I. & N. Dec. 566 (B.I.A. 1976), which predated *Silva* and "stated that a waiver of inadmissibility may be granted in deportation proceedings if the alien was excludable at his last entry as a result of the same facts which formed the basis of his deportability." *Wadud*, 19 I. & N. Dec. at 185 n.3. That is the *nunc-pro-tunc* principle petitioner assumes is good law, but the Board affirmatively "withdr[e]w from that language * * * to the extent that it [was] inconsistent with" the holding in *Wadud* that Section 212(c) "can only be invoked in a deportation hearing where the ground of deportation charged is also a ground of inadmissibility." *Id.* at 184, 185 n.3.

As a result, in deportation proceedings, the same statutory-counterpart requirement applies to the LPR who traveled abroad and subsequently re-entered as to the LPR who never traveled. There is no difference in treatment between the two classes in deportation proceedings, though LPRs who travel abroad may be treated differently if they find themselves in *exclusion* proceedings (because there is no need to satisfy the statutory-counterpart rule to be eligible for relief from a ground of *exclusion*).

Thus, under the statutory-counterpart rule, the question is not "whether the LPR previously traveled abroad" (Pet. Br. 48), but whether the LPR is charged with being excludable or deportable. If the LPR is charged with deportability, *Francis* and *Silva* continue

to make irrelevant whether he or she has departed the country. The LPR still, however, must have a ground of deportability that is comparable to one of the grounds of excludability to which Section 212(c), by its terms, applies.

B. The Board's 2005 Decision Applying Its Statutory-Counterpart Rule To The Crime-Of-Violence Aggravated Felony Ground Of Deportability Did Not Reflect A Change In The Law

The principal thrust of many of petitioner's arguments is that the Board's application of the statutory-counterpart rule in *Blake* and *Brieva-Perez* marked an "abrupt departure" from its prior practice. Pet. Br. 41. To that end, petitioner contends that (1) before 2005, "many cases and authorities held" that "LPRs deportable for 'crime of violence' * * * aggravated felony convictions" were not "categorically barred from relief under the statutory counterpart requirement" (Br. 37); and (2) the Board's pre-2005 published cases and its regulations called for an underlying-conviction-based comparison rather than a statutory-grounds-based comparison (Br. 34-37). Petitioner is incorrect on both counts.

1. There was no established pre-2005 practice of treating the crime-of-violence aggravated felony ground of deportability as comparable to a ground of inadmissibility

Petitioner contends (Br. 32-38) that the Board's application of the statutory-counterpart rule in its 2005 decisions in *Blake* and *Brieva-Perez* constituted a dramatic change or reversal in Board practice, rather than a natural step in the "process of case-by-case adjudication" by which the Board construes and applies the INA. *Aguirre-Aguirre*, 526 U.S. at 425. But petitioner has not

identified a single published opinion of the Board (or of any court of appeals) holding that an alien deportable on the basis of a crime-of-violence aggravated felony satisfies the statutory-counterpart rule for Section 212(c) eligibility.

a. Petitioner cites five published opinions—three by courts of appeals and two by the Board—that purportedly "held that LPRs could seek [Section 212(c)] waivers of aggravated felony convictions, including 'crimes of violence,' in deportation proceedings." Pet. Br. 32 (cross-referencing Pet. Br. 17-18 & n.4).[13] None of those cases contains a holding or even dicta to that effect.

Neither of the two published Board decisions on which petitioner relies involved a crime-of-violence aggravated felony, making it impossible for them to have "held" (Pet. Br. 32) anything about whether that ground of deportability had a comparable ground of exclusion. In the first of those cases, *In re A-A-*, 20 I. & N. Dec. 492 (B.I.A. 1992), the alien entered the United States in 1982 and was convicted in 1985 of murder. *Id.* at 493. He was charged with being deportable under 8 U.S.C. 1251(a)(4) (1988) "as an alien convicted of a crime involving moral turpitude within 5 years after entry." 20 I. & N. Dec. at 493. The Board's comparable-grounds analysis consisted of a single sentence noting that the

---

[13] Petitioner also quotes parenthetically (Br. 19) a statement in a published concurring opinion of a Board Member to the effect that an alien "found guilty of murder or manslaughter alone * * * would be eligible for a section 212(c) waiver." *In re Montenegro*, 20 I. & N. Dec. 603, 610 (B.I.A. 1992) (Heilman, Board Member, concurring). Even if it had appeared in a controlling opinion, that passing and unexplained assertion would have been merely dictum. It thus proves nothing, especially because murder is in a different category of aggravated felony, separate from crimes of violence. See 8 U.S.C. 1101(a)(43)(A).

crime-involving-moral-turpitude charge of deportability was "analogous to the exclusion ground at * * * 8 U.S.C. § 1182(a)(9) (1988)." 20 I. & N. Dec. at 500. That ground of exclusion—which the Board noted (*id.* at 500 n.19) had been revised and redesignated as 8 U.S.C. 1182(a)(2)(A)(i)(I), where it still is today—applied to "a crime involving moral turpitude." Because both the ground of exclusion and the ground of deportability turned in critical part on the very same statutory phrase ("crime involving moral turpitude"), the Board's conclusion that they were comparable grounds was unremarkable. See *In re Salmon*, 16 I. & N. Dec. 734 (B.I.A. 1978).

Although petitioner is correct that *A-A-* discussed whether the alien's murder conviction had been for an aggravated felony (Br. 18, 32), that discussion had nothing to do with comparable-grounds analysis, because the alien there had not been charged with being deportable as an aggravated felon.[14] More importantly, the Board made it clear that the "aggravated felony" ground in question was "murder" and that it could *not* have been a "crime of violence" because that component of the aggravated-felony definition did not apply to offenses, like A-A-'s, committed before November 29, 1990. See 20 I. & N. Dec. at 500.

The Board's decision in the second case petitioner cites, *In re Rodriguez-Cortes*, 20 I. & N. Dec. 587 (B.I.A. 1992), is no more helpful to him. The alien there had

---

[14] The Board's aggravated-felony discussion was necessary to its separate determination that the alien was precluded from receiving Section 212(c) relief by the 1990 provision barring such relief to aliens who had "been convicted of an aggravated felony" and "served a term of imprisonment of at least 5 years." *A-A-*, 20 I. & N. Dec. at 501 (quoting 1990 Act § 511(a), 104 Stat. 5052).

been convicted of "attempted murder in the second degree" and sentenced to a five-year term, which was enhanced by an additional year because a firearm had been used in the offense. *Id.* at 588. She was charged with being deportable on two grounds: for having an aggravated-felony conviction, and for having a conviction of a firearms violation. The Board concluded that the one-year enhancement she had received did not constitute a "conviction for a firearm offense," thus eliminating that ground of deportability. As a result, the lack of a comparable ground of exclusion for the firearm-based ground of deportability became irrelevant, and the alien was not barred from seeking Section 212(c) relief. *Id.* at 590-591.

Rodriguez-Cortes did not address whether there was a comparable ground of exclusion for the aggravated-felony ground of deportability. That alone prevents it from supporting petitioner except by negative implication. But it does not even do that, because the Board made clear that the component of the aggravated-felony definition at issue was not the definition's reference to "crime of violence" but rather its reference to "murder * * * or any attempt * * * to commit any such act." 8 U.S.C. 1101(a)(43) (Supp. III 1991). That is evident because the Board cited *A-A-* in its one-sentence footnote about the aggravated-felony ground of deportation, *Rodriguez-Cortes*, 20 I. & N. Dec. at 589 n.1, and the alien's crime was committed well before the date on which *A-A-* had held that the crime-of-violence component of the aggravated-felony definition became applicable. See *id.* at 588; *A-A-*, 20 I. & N. Dec. at 500.[15]

---

[15] For the same reason, petitioner's reference to "authoritative treatises" is unavailing. See Br. 41 (cross-referencing citation at Pet.

b. Contrary to petitioner's suggestion (Br. 18), the three court of appeals opinions that he cites do not "specifically note[] that the LPRs satisfied the statutory counterpart requirement." They do not mention that requirement, much less explain whether it was satisfied.

In *Hem* v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006), the alien was charged with a crime-of-violence aggravated felony, and the court (like the IJ and the Board) discussed whether he was ineligible for Section 212(c) because, unlike the alien in *St. Cyr*, he had not pleaded guilty to his crime of conviction. *Id.* at 1187-1189. The court never mentioned the statutory-counterpart rule.

In *De Araujo* v. *Gonzales*, 457 F.3d 146 (1st Cir. 2006), the alien was charged with, *inter alia*, a crime-of-violence aggravated felony, but the IJ found him ineligible for Section 212(c) relief for reasons related to his other convictions, and the Board dismissed his appeal. *Id.* at 148. The Board then denied his motion to reopen proceedings, and "further found" that, "even if it were to reopen [the] case, it would not grant his request for [Section 212(c)] relief." *Id.* at 150. The court of appeals affirmed without discussing statutory comparability. *Id.* at 151-155.

In *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004), the alien mounted a collateral attack on a prior removal proceeding in which he had been charged with being removable on the basis of an

---

Br. 19 to 6 Charles Gordon et al., *Immigration Law and Procedure* § 74.04[1][a] and [2][g] (rev. ed. 2011)). Petitioner describes (Br. 19) the Gordon treatise as noting that "murder and rape convictions can be waived." But murder and rape are each defined in a subcategory of aggravated felony separate from crimes of violence. See 8 U.S.C. 1101(a)(43)(A). The Gordon treatise discusses the statutory-counterpart rule at § 74.04[2][e], at 74-47 to 74-49.

attempted-burglary (not crime-of-violence) aggravated felony under Section 1101(a)(43)(G). *Id.* at 1045-1046. The alien claimed that the proceeding had been constitutionally infirm because the IJ had failed to inform him that "he may be eligible" for Section 212(c) relief. *Id.* at 1048. The Ninth Circuit held that the alien had shown prejudice because there was "a 'plausible' ground for relief," but the only potential bar to eligibility that the court discussed was the fact that petitioner's offense had not been an aggravated felony at the time of his guilty plea. *Id.* at 1050. It did not consider whether 8 U.S.C. 1101(a)(43)(G) is comparable to a ground of exclusion.

c. Petitioner also cites nine unpublished decisions of the Board in support of the proposition that LPRs charged with crime-of-violence aggravated felonies had "satisfied the statutory counterpart requirement." Pet. Br. 18 & n.4. An unpublished decision—often issued by an individual member, rather than a three-member panel, or the en banc tribunal—is, of course, not precedential. See 8 C.F.R. 1003.1(g); *Ajdin* v. *Bureau of Citizenship & Immigration Servs.*, 437 F.3d 261, 264-265 (2d Cir. 2006) (finding the Board's "apparent inconsistency" with one of its prior decisions to be "of no moment because unpublished opinions of the BIA have no precedential value").

In any event, the unpublished decisions petitioner cites generally contain too little discussion to establish that crime-of-violence aggravated felonies were well-understood as having a comparable ground of exclusion. In one of those cases, the alien was charged with being *inadmissible* (not deportable) for an extortion conviction that was a crime involving moral turpitude, making

it entirely inapposite.[16] One case involved a burglary conviction, which was addressed primarily as an aggravated felony under 8 U.S.C. 1101(a)(43)(G), though the Board noted it was also a crime of violence.[17] In three others, the decision did not specify whether robbery convictions were charged as crimes of violence, but stated that they could have been aggravated felonies under Section 1101(a)(43)(F) or (G).[18] Two cases involved offenses that could have been charged (but were not) under other parts of the aggravated-felony definition, which may have altered the comparability analysis.[19] To be sure, two of the decisions involved a determination that a crime-of-violence aggravated felony did have a comparable ground of exclusion.[20] But at least

---

[16] *In re Orrosquieta*, No. A92 799 659, 2003 WL 23508672 (B.I.A. Dec. 19, 2003).

[17] *In re Martinez*, No. A22 166 294, 2004 WL 1167082 (B.I.A. Feb. 18, 2004).

[18] *In re S-Lei*, No. A38 139 424 (B.I.A. May 27, 2004) (Pet. App. 57a-58a); *In re Loney*, No. A35 770 136, 2004 WL 1167256, at *1 (B.I.A. Feb. 10, 2004); *In re Rowe*, No. A37 749 964 (B.I.A. May 9, 1993) (Pet. App. 41a-44a).

[19] *In re Caro-Lozano*, No. A90 870 395, 2004 WL 1398661, at *1-*2 (B.I.A. Apr. 22, 2004) (attempted rape charged as crime of violence under Section 1101(a)(43)(F), but could possibly have been charged under Sections 1101(a)(43)(A) and (U)); *In re Hussein*, No. A26 416 298, 2004 WL 1059601 (B.I.A. Mar. 15, 2004) (indecency with a child charged as crime of violence, but Board acknowledged it could also satisfy Section 1101(a)(43)(A)). The Board has since made clear that the *possibility* of a charge on a different aggravated-felony ground should not affect the analysis. See *Brieva-Perez*, 23 I. & N. Dec. at 772 n.4.

[20] *In re Reyes Manzueta*, No. A93 022 672, 2003 WL 23269892, at *2 (B.I.A. Dec. 1, 2003) (first-degree manslaughter); *In re Munoz*, No. A35 279 774, 28 Immig. Rptr. B1-1 (B.I.A. Aug. 7, 2003) (Pet. App. 45a-55a) (aggravated assault on peace officer).

one other unpublished opinion from a few months later reached exactly the opposite conclusion.[21]

Accordingly, the unpublished opinions do not support petitioner's assertion (Br. 37) that "many cases and authorities" before 2005 "held" that LPRs deportable for crime-of-violence aggravated felonies were not "categorically barred from relief under the statutory counterpart requirement." Taken as a whole, they merely show that the Board had not yet settled how its long-standing comparability analysis applied to crime-of-violence aggravated felonies. Only a published decision of the Board could supply the precedent necessary to resolve the issue authoritatively.

d. Petitioner refers (Br. 23 n.7, 32) to a handful of unpublished Board decisions, and one court of appeals brief, in which he says the government or the Board has "admi[tted]" that the Board's decisions in *Blake* and *Brieva-Perez* represented a retroactive "change in the law." Some of the Board decisions, however, merely referred to the fact that, after the IJ issued the opinion on appeal, there had been an "intervening" precedential opinion of the Board, which is one of the itemized bases on which a single Board member is authorized to reverse

---

[21] See *In re Patarroyo-Sanchez*, No. A42 279 463, 2004 WL 1739093 (B.I.A. June 18, 2004) (holding that burglary, when charged as crime-of-violence aggravated felony, was not ground of deportability sufficiently comparable to ground of inadmissibility to permit Section 212(c) relief because of "the existence of a significant variance between the types of offenses that may give rise to deportability and inadmissibility" under Sections 1101(a)(43)(F) and 1182(a)(2)(A)(i)(I); noting that Board had allowed alien to apply for Section 212(c) waiver when same conviction was charged only under 8 U.S.C. 1101(a)(43)(G)).

a decision on appeal. See 8 C.F.R. 1003.1(e)(5).[22] Petitioner highlights (Br. 23, 32, 38) a casual reference to *Blake* as a "change in the law" in another cursory opinion remanding for further proceedings. *In re Cardona*, No. A40 065 318, 2005 WL 3709244 (B.I.A. Dec. 27, 2005). But the Board's later opinion in that same case (which was, again, unpublished) explained that "[o]ur decision in *Matter of Blake* was not based upon any change in the law; rather, it is simply an extension of our long line of cases holding that section 212(c) relief is only available where there is a corresponding ground of inadmissibility." *In re Cardona*, No. A40 065 318 (B.I.A. Jan. 24, 2008) (reprinted in App., *infra*, 1a-3a).

Petitioner quotes (Br. 32) a brief the government filed as a respondent in the Ninth Circuit, which, in the course of discussing the effect of an earlier district court order that an IJ should allow the alien to apply for Section 212(c) relief, said that the IJ had correctly found that res judicata principles were inapplicable because *Blake* and *Brieva-Perez* "constituted an intervening change in the law." Resp. Br. at 16, *Paulo* v. *Holder*, No. 07-71198 (9th Cir. filed Nov. 12, 2010). The Ninth Circuit, however, flatly rejected that proposition: "[I]t is clear to us that *Blake* and *Brieva* did not effect a change of law." *Paulo* v. *Holder*, No. 07-71198, 2011 WL 1663572, at *8 (May 4, 2011).

Petitioner's collection of stray references to a "change" is overwhelmed by the reality that *Blake* and *Brieva-Perez* constituted an ordinary step in the case-by-case development of the Board's jurisprudence. Although petitioner twice invokes (Br. 23 & n.7, 41) the

---

[22] See *In re Banuelos-Delena*, No. A92 789 794, 2006 WL 901335 (B.I.A. Mar. 2, 2006); *In re Gomez-Perez*, No. A37 447 529, 2006 WL 901334 (B.I.A. Mar. 1, 2006).

Eleventh Circuit's reference to *In re Blake* as "a watershed moment in § 212(c) jurisprudence," *De la Rosa*, 579 F.3d at 1332, that court held that the Board has been "consistent[]" in following a "categorical approach that focuses on the charged ground of deportability rather than the underlying offense," and that *Blake* "did not represent a departure from prior BIA practice." *Id.* at 1336.

Even the Second Circuit's decision in *Blake* held that "[t]he statutory counterpart rule" had not "changed the law," because it did "nothing more than crystallize the agency's preexisting body of law and therefore cannot have an impermissible retroactive effect." 489 F.3d at 98-99. In fact, no court of appeals has accepted the claim that the Board's 2005 decisions represented a "change" in the relevant sense. See, *e.g.*, *Zamora-Mallari*, 514 F.3d at 689 ("[T]he Board in *Blake* did not establish a new rule of law, but rather applied the previously well-established comparability standard in a different factual context."); *Vo*, 482 F.3d at 370 (finding the Board's interpretation of the statutory-counterpart rule was not "irrational or arbitrary and capricious" because there had been no "substantial shift in agency practice"); *Caroleo*, 476 F.3d at 163 (concluding that the "statutory counterpart" principle "has been firmly in place *and consistently applied* since at least 1991") (emphasis added); *Valere* v. *Gonzales*, 473 F.3d 757, 761-762 (7th Cir. 2007) (finding "application of *Blake* * * * is not impermissibly retroactive" because "the rule itself is not new," although "the *Blake* decision marked the first time the BIA applied the rule to the crime of sexual assault of a minor").

2. The Board, more generally, had long used a grounds-based approach in analyzing comparability and had rejected petitioner's conviction-based approach

As just discussed, petitioner errs in contending that there were pre-2005 published opinions of the Board addressing whether a crime-of-violence aggravated felony satisfied the statutory-counterpart rule. But his more general claims about the Board's pre-2005 methodology are also mistaken.

a. Petitioner contends that the Board's decisions in *Blake* and *Brieva-Perez* "altered [the] fundamental character" of the statutory-counterpart rule because they looked to the "language" used in the statute to describe the charge of deportability, rather than simply "determining whether the deportable conviction triggered inadmissibility." Pet. Br. 37 (emphasis omitted). Petitioner thus argues that, until 2005, "what mattered was whether the aggravated felony '*conviction* . . . could also form the basis for excludability.'" Pet. Br. 34 (quoting *Meza*, 20 I. & N. Dec. at 259) (emphasis supplied by petitioner). Petitioner also relies (Br. 36) on a sentence from *Granados*, *supra*, which said that a "[c]onviction for possession of a concealed sawed-off shotgun is not a specified section 212(a) ground of excludability, nor a crime involving moral turpitude that would render the respondent excludable." 16 I. & N. Dec. at 728.

Whenever such an articulation of the rule was presented to the Board, however, it rejected the proposition that statutory comparability depends on the attributes of an alien's underlying "conviction" rather than the charged statutory ground of deportability. For instance, in 1984, an alien quoted the sentence above from *Granados*, and the Board rejected it as "dictum which is not controlling." *Wadud*, 19 I. & N. Dec. at 185. The Board

found it unnecessary to determine whether the alien's "conviction was one involving moral turpitude," because it "decline[d] to expand the scope of section 212(c) relief in cases where the *ground* of deportability charged is not also a *ground* of inadmissibility." *Ibid.* (emphases added).

The Board repeatedly made similar determinations in later cases, reiterating that it would not expand Section 212(c) "to include cases where the ground of deportability charged is not also a ground of inadmissibility, even where the alien's conviction would also cause him to be excludable for having been convicted of a crime involving moral turpitude." *In re Gabryelsky*, 20 I. & N. Dec. 750, 754 (B.I.A. 1993). As the Board explained in 1992:

> It is important to recognize that the relief provided by section 212(c) is the waiver of a particular *ground* of exclusion or deportation, not a waiver of the particular offense which forms the basis for that ground of exclusion or deportation. The focus * * * is not whether the deportable alien's particular offense * * * could form the basis for a ground of exclusion and therefore be waivable; rather the focus is whether the ground of deportation against the alien has a comparable ground of exclusion.

In re Esposito, 21 I. & N. Dec. 1, 7 (B.I.A. 1992); see also, *e.g.*, *In re Jimenez-Santillano*, 21 I. & N. Dec. 567, 574 (B.I.A. 1996) (en banc); *In re Montenegro*, 20 I. & N. Dec. 603, 605 (B.I.A. 1992).

Petitioner also suggests (Br. 37) that *Blake* and *Brieva-Perez* departed from earlier practice by analyzing "*subcategories*" of the definition of aggravated felony. But the Board's decision in *Meza* recognized that

the definition "refers to several types or categories of offenses." 20 I. & N. Dec. at 259. It expressly focused on "[t]he specific category of aggravated felony at issue" in that case (the one dealing with drug-trafficking crimes) and found it to be comparable to a drug-trafficking ground of exclusion. *Ibid.* Accordingly, *Brieva-Perez* did nothing novel in focusing on the crime-of-violence component of the definition of aggravated felony when conducting its comparable-grounds analysis.

The Board's pre-2005 case law therefore does not support petitioner's vision of the statutory-counterpart rule.

b. Petitioner also characterizes (Br. 10) the "long-standing regulations still in force today" as authorizing the "waiver" under Section 212(c) of an alien's "conviction." But the regulations belie that description. They do not authorize the waiver of a *conviction* for immigration purposes. Instead, they specify that when Section 212(c) relief is granted, it will be valid as to the "specific *grounds* of excludability, deportability, or removability that were described in the application." 8 C.F.R. 1212.3(d) (emphasis added); see 8 C.F.R. 212.3(d); see also *In re Balderas*, 20 I. & N. Dec. 389, 391 n.2 ("[T]he use of phrases such as, 'the conviction was waived under section 212(c),' is misleading.").

The regulations therefore bolster, rather than contradict, the Board's view—well-established both before and after 2005—that the statutory-counterpart analysis is grounds-based rather than conviction-based.

c. Finally, petitioner relies (Br. 29-31, 44-46) on the notion of congressional acquiescence. But, given the firmly rooted nature of the Board's grounds-based application of the statutory-counterpart rule, and its repeated rejection of the conviction-based view, congres-

sional acquiescence, to the extent that it plays a role here, cuts against petitioner and in favor of the Board.

C. The Board's Application Of Its Statutory-Counterpart Rule Is Not Impermissibly Retroactive

Petitioner contends that the Board's application of its statutory-counterpart rule in *Blake* and *Brieva-Perez* was impermissibly retroactive because it changed the law and "attach[ed] new consequences to guilty pleas entered in reliance on the prior regime." Pet. Br. 31. To that end, he relies (Br. 39-40) on *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947), and the more specific five-factor test articulated in *Retail, Wholesale & Department Store Union* v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972). With respect to one of the *Retail* case's factors (the fourth), petitioner does suffer some "burden" (Pet. Br. 42) because he is ineligible for discretionary relief under former Section 212(c). But, assuming *arguendo* that it would be appropriate to apply the approach in the *Retail* case here, none of its other factors points in his direction.

1. The mainstay of petitioner's retroactivity argument is his contention (Br. 40-42), with respect to the first two factors, that the Board made an "abrupt departure" with respect to a question that was not "one of first impression." Yet, as discussed at length above, that is not true. Contrary to petitioner's declaration (Br. 42), *Blake* and *Brieva-Perez* did represent "a situation in which the [Board] * * * had to apply an evolving line of decisions to a new factual situation." There were no precedential opinions on point. See pp. 30-39, *supra*. But there were general principles in the Board's precedents that are consistent with the Board's current approach and do not support petitioner's proposed revision

of the statutory-counterpart rule. See pp. 40-43, *supra*. This case therefore lacks the principal features that raise "judicial hackles." *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.).

2. Petitioner's claim of impermissible retroactivity suffers from another fundamental problem, in that he cannot show, with respect to the third factor, that an alien in his circumstances would have reasonably relied on the statutory-counterpart rule at the relevant time.

As petitioner acknowledges (Br. 42), when this Court found an impermissible retroactive effect in *St. Cyr*, it placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*." 533 U.S. at 321. *St. Cyr* thus focused on the prospect of detrimental reliance by an alien who pleaded guilty to an aggravated felony between 1990, when Congress enacted the bar to Section 212(c) relief for aliens who served more than five years on a sentence for an aggravated felony, and 1996, when Congress repealed Section 212(c) altogether. See 533 U.S. at 293, 297.

When St. Cyr pleaded guilty, his controlled-substance offense was an aggravated felony that made him deportable. See 8 U.S.C. 1101(a)(43)(B) (1994) (including "illicit trafficking in a controlled substance" in definition of aggravated felony); 8 U.S.C. 1251(a)(2)(A)(iii) (1994). An alien in those circumstances concerned about preserving eligibility for Section 212(c) relief would have had an incentive to enter into a plea agreement that provided for a sentence of five years or less, rather than go to trial and risk a longer (and disqualifying) sentence, and accordingly might have developed reasonable reliance interests. See *St. Cyr*, 533 U.S. at 323 (describing circumstances of an alien whose "sole purpose" in plea negotiations was to "ensure" a

sentence of less than five years); see also *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 43-44 (2006) (explaining that *St. Cyr* "emphasized that plea agreements involve a *quid pro quo* * * * which in practical terms was valued in light of the possible discretionary relief, a focus of expectation and reliance") (internal quotation marks and citations omitted).

Petitioner asserts that "the BIA's ruling here retroactively altered the terms of" his plea bargain (Br. 42), but that is implausible. Petitioner's 1989 voluntary-manslaughter conviction neither made him deportable nor exposed him to the not-yet-created aggravated-felony bar on Section 212(c) relief. See pp. 11-12, *supra*. He did not become deportable until IIRIRA was enacted in 1996.[23] As a result, in considering whether to plead guilty, he was not making a choice "between facing possible deportation and facing certain deportation." *St. Cyr*, 533 U.S. at 325. It is accordingly unreasonable to infer that an alien in his circumstances would have negotiated his plea agreement with a focus on Section 212(c) relief—much less on being able to satisfy the statutory-counterpart rule.[24] Indeed, the Second Circuit in *Blake* concluded that it would be "illogical" to say that aliens "relied on the law in effect at the time of their guilty plea[s]" when they would not "have been deportable at the time of their plea[s], making it impossible for

---

[23] As *St. Cyr* recognized, Congress "unambiguously" indicated that "IIRIRA's amendment of the definition of 'aggravated felony'" would apply retroactively to earlier convictions. 533 U.S. at 318-319.

[24] Although petitioner may have known at the time of his guilty plea that the resulting conviction (of a crime involving moral turpitude for purposes of the INA) would render him excludable, the statutory-counterpart rule does not limit Section 212(c) eligibility for an LPR who is only excludable and not deportable.

them to even think they would need a § 212(c) waiver to stay in the country." 489 F.3d at 99 n.8; see also *Dalombo Fontes*, 483 F.3d at 123 n.4 (finding "no retroactivity problem" where the crime-of-violence aggravated felony ground of deportability "did not exist" when the alien pleaded nolo contendere).

3. For purposes of the fifth factor—pertaining to the government's potential interests in the Board's application of its statutory-counterpart rule—petitioner asserts (Br. 43) that this Court would "ultimately do[] no harm to the enforcement scheme" by rejecting the Board's reasonable interpretation and application of Section 212(c) in *Blake* and *Brieva-Perez* "because actual relief on the merits" under former Section 212(c) would "remain[] *discretionary*." He says (Br. 44) that "[a]ll [he] seeks is that an IJ *consider* his application under the agency's established standards for Section 212(c) relief," and the Department of Justice "has very little (if any) 'statutory interest' in refusing to do even *that*." But the Board plainly does have an interest in a sound interpretation of Section 212(c) and in not extending relief beyond what it has concluded that Congress authorized.

Moreover, the government does not have unlimited resources, and petitioner's proposed rule would be far from costless. Even before IJs reached the point of considering the merits of Section 212(c) applications, petitioner's approach would likely increase the costs of deciding who is eligible for relief, because he acknowledges the validity of the statutory-counterpart rule (but just asks that it be applied at a different level of generality). The Board has decided that eligibility can be determined on a category-by-category, rather than an offense-by-offense, basis, which currently allows a single precedential decision to dictate whether an entire category of

aggravated felonies (such as crimes of violence) satisfies the statutory-counterpart rule. Under petitioner's approach, however, the decision about eligibility would need to be made many times over—not just with respect to each kind of crime of violence, but also, for purposes of each generic crime within that category (such as manslaughter), with respect to various statutes of conviction in different States (and countries), to determine whether the offense is a crime involving moral turpitude that would render the alien inadmissible.

In every case in which petitioner's proposed application of the statutory-counterpart rule would require an exercise of the agency's discretion about whether to grant relief, DHS, IJs, and the Board would devote scarce agency resources to litigating and then making a multi-factor balancing judgment about whether the alien warrants relief. See *In re Arreguin*, 21 I. & N. Dec. 38, 39 (B.I.A. 1995). An IJ's denial of relief could be appealed to the Board, which would conduct an "independent review of the record" and engage in de novo review of the exercise of discretion. *Id.* at 40; see 8 C.F.R. 1003.1(d)(3)(ii).

Such procedures would consume not only agency resources, but also time. And significant delays could occur even in cases where a favorable exercise of discretion was essentially inconceivable at the outset. As this Court has repeatedly observed: "[A]s a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Stone* v. *INS*, 514 U.S. 386, 399-400 (1995) (quoting *INS* v. *Doherty*, 502 U.S. 314, 323 (1992)).[25]

---

[25] Petitioner's own case illustrates that point. The Board issued its decision more than five years ago, Pet. App. 5a, but even if petitioner

In light of the foregoing, the Board's 2005 cases applying the statutory-counterpart rule do not have an impermissibly retroactive effect. There is accordingly no reason for this Court to "vacate and remand" to enable the Board to provide further explanation for its decision, as petitioner requests (Br. 53-55) in the alternative.

---

prevails in this Court, there is a reasonable likelihood that he will ultimately be ineligible for relief on grounds independent of the statutory-counterpart rule. As he notes, the Board did not rely on his 2003 grand-theft conviction in finding him removable (Pet. Br. 25 n.8), but it would not be precluded from considering that conviction on remand. Petitioner has argued it was not an aggravated felony as defined in 8 U.S.C. 1101(a)(43)(G), but he has not denied that it was a crime involving moral turpitude. See note 5, *supra*; see also *Garcia-Lopez* v. *Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003) (recognizing grand theft under California law as a crime involving moral turpitude). Because his manslaughter conviction was also a crime involving moral turpitude, the Board could determine that petitioner has been convicted of "two or more crimes involving moral turpitude" and affirm the IJ's finding that he is removable under 8 U.S.C. 1227(a)(2)(A)(ii). Because that other ground of removability turns on a guilty plea and conviction that occurred well after Section 212(c) was repealed by IIRIRA, relief under former Section 212(c) would not be independently available for that ground. See *Aguilar-Ramos* v. *Holder*, 594 F.3d 701, 706 (9th Cir. 2010) (holding there was no "authority to waive the second ground for Aguilar's removal—conviction of *two* crimes involving moral turpitude—because Aguilar did not plead to the second crime involving moral turpitude until *after* Congress repealed section 212(c)"); 8 C.F.R. 1212.3(h)(3). Cf. *Duhaney* v. *Attorney Gen.*, 621 F.3d 340, 351, 354 (3d Cir. 2010) (prior grant of Section 212(c) relief did not preclude new removability charge "based on a ground * * * that did not even become available until after [the alien] was granted a § 212(c) waiver"), cert. denied, No. 10-9039 (June 6, 2011).

D. The Statutory-Counterpart Rule Does Not Raise Equal-Protection Concerns

Petitioner contends that the Board's application of the statutory-counterpart rule "raises serious equal protection concerns." Br. 51 (capitalization modified). It does not.

1. As this Court has repeatedly stated: "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)). Whether an immigration provision is constitutional depends only on the existence of a "facially legitimate and bona fide reason" for its enactment. *Id.* at 794 (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972)). The Board's statutory-counterpart rule satisfies that highly deferential standard.[26]

---

[26] Petitioner asserts (Br. 52 n.19) that the "facially legitimate and bona fide reason" standard applies only to "initial admission decisions" and not to "longstanding residents." But the cases he cites do not draw that distinction, and *Fiallo* was based on the recognition that "the power to *expel* or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." 430 U.S. at 792 (quoting *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953)) (emphasis added); see also *id.* at 793 n.4 ("Policies pertaining to the entry of aliens and *their right to remain here* are peculiarly concerned with the political conduct of government.") (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)) (emphasis added). In *Galvan*, the alien being deported had resided in the United States for 36 years. 347 U.S. at 523. Thus, the *Fiallo* standard is akin to rational-basis review, but recognizes that "legislative distinctions in the immigration area need not be as carefully tuned to alternative considerations as those in the domestic area." 430 U.S. at 799 n.8 (quotation marks and citation omitted).

2. Petitioner is incorrect in asserting (Br. 52) that "[t]he BIA's distinction in *Blake* is identical to the one discredited in *Francis*." In *Francis* (and *Silva*), the LPRs' drug-trafficking ground of deportability was comparable to the drug-trafficking ground of exclusion, see *Francis*, 532 F.2d at 269-270 & n.2; *Silva*, 16 I. & N. Dec. at 27, which meant that their failure to travel outside the United States was all that prevented them from being eligible for the *nunc-pro-tunc* Section 212(c) relief that was available to those who had. Here, the statutory-counterpart rule does not distinguish between deportable LPRs who are similarly situated in every respect except whether they have traveled abroad or remained in the United States.

Petitioner also errs in contending (Br. 52) that the Board's application of the statutory-counterpart rule "distinguish[es] between two LPRs deportable under the same deportation provision due to the same criminal conviction." See also Pet. Br. 48. As explained above, that contention is rooted in an obsolete understanding of the interaction between the *nunc-pro-tunc* practice and comparable-grounds analysis. See pp. 28-30, *supra*. The statutory-counterpart rule does not in fact distinguish between LPRs who are deportable under the "same deportation provision." Rather, it makes a distinction between LPRs who are removable on *different* grounds of deportability (*e.g.*, when one has a comparable ground of exclusion and one does not).

Because of those distinctions, the statutory-counterpart rule ensures that the alien who is ineligible for relief is not "similarly situated" with the one who is eligible, thus foreclosing any equal-protection violation. See, *e.g.*, *Frederick* v. *Holder*, 644 F.3d 357, 363 (7th Cir. 2011) ("[T]he statutory-counterpart rule can hardly vio-

late equal protection because it is itself the test for an equal-protection violation."), petition for cert. pending, No. 11-135 (filed Aug. 1, 2011).

3. In any event, it is not irrational for the Board to distinguish between inadmissible and deportable aliens on a categorical basis. There are, needless to say, countless such distinctions in the INA. See pp. 2-3, *supra*. Although petitioner contends (Br. 52) that it is "irrational[]" to give "worse treatment to those [LPRs] who did not leave and who therefore have stronger ties to this country," he overlooks a sensible reason to make discretionary relief available to aliens who take actions to place themselves in exclusion rather than deportation proceedings.

The aliens affected by the operation of the statutory-counterpart rule are LPRs who are deportable (and often also excludable). As several courts have concluded, making discretionary relief available on more favorable terms to aliens who are in admission rather than deportation proceedings can provide an "incentive for deportable aliens to leave the country * * * without their having to be ordered to leave at the government's expense." *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299, 309 (5th Cir. 1999) (quoting *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000)); see also *Abebe*, 554 F.3d at 1206 ("By encouraging such self-deportation, the government could save resources it would otherwise devote to arresting and deporting these aliens."); *Thap* v. *Mukasey*, 544 F.3d 674, 680 (6th Cir. 2008); *Vo*, 482 F.2d at 371; *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1153 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000).

Petitioner questions (Br. 48 n.18) whether Congress's actions are all consistent with an intention of

encouraging self-*deporting* by LPRs. But he cannot deny that the government has an important interest in enforcing the immigration laws against such individuals—or at least in knowing enough about them to determine how best to exercise discretion in enforcing the immigration laws, whether that discretion comes at the stage of bringing charges or granting relief from grounds of inadmissibility or deportability. The Board's statutory-counterpart rule is more likely to serve those ends by promoting self-*reporting*, because it gives LPRs an incentive to be applicants for admission rather than respondents in deportation proceedings; and that can be accomplished either by seeking to enter the United States or by filing an Application For Advance Permission To Return To Unrelinquished Domicile (Pet. Br. App. 22a-23a). Petitioner's rule, by contrast, would create a disincentive to coming forward, because LPRs could try to evade immigration officials for as long as possible and simply plan on being eligible to seek Section 212(c) relief if caught and placed in deportation proceedings. The positive incentives created by the Board's rule constitute a "facially legitimate and bona fide reason" for it. *Fiallo*, 430 U.S. at 794.

4. Even if the Court were to determine that the Board's application of the statutory-counterpart rule raised serious equal-protection concerns, that still would not compel the remedy petitioner requests ("construe[ing] the statute and regulations to permit grants of discretionary relief to LPRs like [p]etitioner," Pet. Br. 53). Because "unequal treatment * * * may as logically be attributed to the disparately generous provision * * * as to the disparately parsimonious one," *Miller* v. *Albright*, 523 U.S. 420, 458 (1998) (Scalia, J., concurring in the judgment), any constitutional violation, or serious

constitutional doubt, could be eliminated by contracting the availability of Section 212(c) relief rather than expanding it. The choice between those two remedies is dictated by Congress's presumed intentions. See, *e.g.*, *Nguyen* v. *INS*, 533 U.S. 53, 72 (2001); *Miller*, 523 U.S. at 489 (Breyer, J., dissenting).

In the context of Section 212(c), there is good reason to believe that Congress would prefer to contract rather than expand the availability of relief to criminal aliens. Congress acted repeatedly between 1990 and 1996 to cut back on the provision's applicability: first barring it to those who had been convicted of aggravated felonies and served at least five years of imprisonment (1990 Act § 511(a), 104 Stat. 5052), then barring it altogether to those "deportable by reason of" various criminal grounds, including aggravated-felony convictions (AEDPA § 440(d)(2), 110 Stat. 1277), and then repealing it entirely (IIRIRA § 304(b), 110 Stat. 3009-597). In fact, Congress has already provided a clear illustration of what it would do if it were to design a mechanism for discretionary relief from removal that needed to apply equally to LPRs who are inadmissible and LPRs who are deportable: Under the provision that authorizes the Attorney General to cancel removal for an LPR "who is inadmissible or deportable," relief is not available to *any* alien who has "been convicted of any aggravated felony." 8 U.S.C. 1229b(a)(3).

In light of such evidence of congressional intent, there is no justification for expanding former Section 212(c) to encompass categories of aliens who were embraced by neither unambiguous statutory text nor the agency's longstanding practice, which, in light of the statute's roots in grounds of exclusion, extended eligibility only to aliens in deportation proceedings who were far

more analogous to aliens in exclusion proceedings than is petitioner.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

CURTIS E. GANNON
Assistant to the Solicitor General

DONALD E. KEENER
ALISON R. DRUCKER
ANDREW MACLACHLAN
Attorneys

AUGUST 2011

APPENDIX

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A40 065 318 - Seattle, WA

Date: [JAN 24, 2008]

In re: SALVADOR CARDONA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Stephanie Thorpe, Esquire

ON BEHALF OF DHS:
Marci L. Ellsworth
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)]—Convicted of aggravated felony as defined in section 101(a)(43)(F), I&N Act [8 U.S.C. § 1101(a)(43)(F)]

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)]—Convicted of aggravated felony as defined in section 101(a)(43)(A), I&N Act [8 U.S.C. § 1101(a)(43)(A)]

APPLICATION: Section 212(c) waiver

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). We are not persuaded by the respondent's arguments on appeal relating to the propriety of our decision in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), and its application to the respondent's proceedings. It is well established that section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996), is limited to charges of deportability for which there is a comparable ground of inadmissibility. Our decision in *Matter of Blake* was not based upon any change in the law; rather, it is simply an extension of our long line of cases holding that section 212(c) relief is only available where there is a corresponding ground of inadmissibility. We recognize that the United States Court of Appeals for the Second Circuit disagrees with the Board's analysis in *Matter of Blake*, but we decline to follow the Second Circuit's holding in cases arising outside of that Circuit. *See Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007). Additionally we point out that the other ground upon which the respondent is removable, for having been convicted of a crime of violence aggravated felony, also lacks a comparable ground of inadmissibility. *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). The respondent is therefore unable to waive either of his grounds of removability under section 212(c) of the Act.

We only additionally note that the Department of Homeland Security filed its motion to reconsider our August 18, 2005, decision in this case on September 15, 2005; thus, it was timely filed. The respondent's objections to this motion to reconsider were considered by the Board in the December 27, 2005, order that granted the motion. Accordingly, the appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD

portation and exclusion proceedings." *Matter of Balderas*, 20 I. & N. Dec. 389, 393 (BIA 1991).

3. The government strikingly concedes that, under its theory, it "is possible" for an LPR to "receive Section 212(c) relief from exclusion because of a conviction but still be susceptible to a deportation charge based on the same conviction and brought the very next day." Br. 25-26 (internal quotation marks and alterations omitted). But even the agency has found this bizarre result "clearly repugnant." *G-A-*, 7 I. & N. Dec. at 275-276; *see also Balderas*, 20 I. & N. Dec. at 393; *Mascorro-Perales*, 12 I. & N. Dec. at 230. There is nothing more irrational than adopting a rule while stridently condemning its logical consequences.

Recognizing this, the government obliquely promises to solve the problem through unilateral, unreviewable exercises of prosecutorial restraint (with no assurance such restraint would be consistently required or followed). Br. 26. The agency cannot address one level of arbitrariness by interposing another. The government's need to resort to such a *deus-ex-machina* solution should be taken as an admission that *Blake*, on its own, is irrational.

4. The government's submission reveals a further irrationality in the BIA's new policy: deportable aggravated felony crimes of violence in fact *do* overlap substantially, if not totally, with excludable CIMTs. The government concedes that the BIA's regime does not require "perfect symmetry" between deportation and exclusion provisions, *Brieva-Perez*, 23 I. & N. Dec. at 773; it suffices that they be "sufficiently analogous" or "sufficiently alike." Br. 23, 27. The government does not explain what level of likeness is "sufficient[]" or by what standard "analogousness" is assessed, yet it de-

fends the BIA's ultimate conclusion that aggravated-felony crime-of-violence offenses do not "sufficiently" overlap with CIMTs. Br. 26-28.

In reality, most, if not all, aggravated felony crimes of violence are also CIMTs. A "'felony,' ... is a 'serious crime'" and "an 'aggravated' offense is one 'made worse or more serious by circumstances such as violence, ... a deadly weapon, or the intent to commit another crime.'" *Carachuri-Rosendo*, 130 S. Ct. at 2585. And "[t]he ordinary meaning" of crime of violence "suggests a category of *violent, active crimes*." *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004) (emphasis added). Such offenses will almost invariably involve "reprehensible conduct committed with some degree of scienter," thus qualifying them as CIMTs as well. *Matter of Louissaint*, 24 I. & N. Dec. 754, 757 (BIA 2009).

The government's attempt to identify counterexamples proves this point. The BIA's example of "unauthorized use of a motor vehicle," *Brieva-Perez*, 23 I. & N. Dec. at 769-770, 772-773, is bad law: it relies on a Fifth Circuit decision—since abandoned by that circuit—that wrongly accounted that offense an aggravated felony. *See Serna-Guerra* v. *Holder*, 354 Fed. App'x 929 (2009) (holding, after remand from this Court, that unauthorized use is *not* an aggravated felony). As for burglary (Br. 27), the BIA recently held that "unlawful entry into the dwelling of another with the intent to commit *any crime* therein is a [CIMT]," and it measured the moral turpitude of that burglary offense by the risk of *violence*. *Louissaint*, 24 I. & N. Dec. at 760; *see also* 23 A.L.R. Fed. 480, §2[a] ("Where crimes against the person are involved, the presence or absence of unjustified violence is usually considered to be the measure of the crime's moral turpitude"). And even if some burglary or assault crimes could qualify as

not involving moral turpitude because they arise "in the absence of *aggravating factors*" (Br. 27 (emphasis added)), it is unclear how such offenses would still constitute *aggravated* felonies. Indeed, the government concedes that its final example ("criminally negligent child abuse") was *neither* a CIMT nor an aggravated felony crime of violence. Br. 27.

Even if the government could identify isolated aggravated felony crimes of violence that were not also morally turpitudinous, they would constitute a slim minority of the offenses captured by the aggravated felony crime-of-violence provision—a minority that could be dealt with by ruling *those* crimes Section 212(c)-ineligible because (like firearms offenses) they do not trigger excludability. It is utterly irrational to treat the crime-of-violence and CIMT provisions as *categorically* dissimilar where their overlap is extensive and potentially total. The government has shown no reason for giving a ton of weight to what is at most an ounce of difference.[7]

C. *Blake* And *Brieva-Perez* Create Serious Equal Protection Concerns

The government does not attempt to justify treating deportable LPRs differently based on travel history. Instead, it denies that the BIA has recreated such a distinction, repeating its erroneous view that

---

[7] The government does not defend *Blake*'s holding that aggravated-felony sexual-abuse-of-a-minor convictions categorically fail to qualify as CIMTs. Br. 26. That is likely because the set of *aggravated* felonious sex crimes perpetrated against minor children that involve no moral turpitude is either null or vanishingly small.

Wadud overruled *G-A-* and other longstanding agency precedent. Br. 50. As demonstrated above (pp. 16-18), the government misreads *Wadud*. Under *G-A-*, which remains good law, LPRs seeking *nunc pro tunc* relief remain Section 212(c)-eligible if their crime was excludable at their last entry, while *Blake* applies a more restrictive rule to non-departing LPRs. The irrationality of that distinction is manifest, as the BIA has recognized since *Silva*.[8]

Unable to justify that distinction, the government tries to make its task easier by discussing a distinction between LPRs in deportation proceedings and LPRs in *exclusion* proceedings. Br. 52. To begin with, neither Congress nor the BIA has ever suggested that Section 212(c) should be implemented to "give[] LPRs an incentive to be applicants for admission" (*id.*); on the contrary, the BIA has stated that Section 212(c) applications are equivalent whether submitted in exclusion or deportation proceedings. *See A-A-*, 20 I. & N. Dec. at 502 n.22; Pet. Br. 8-11 (discussing agency regulations). But more importantly, the government addresses the wrong distinction: the LPRs *in deportation proceedings* who remain eligible under *G-A-* to apply for relief *nunc pro tunc* did not "self-report[]" or "com[e] forward." Br. 52. In fact, the only incentive created by *Blake* is an incentive to travel abroad before proceedings begin (*see* Cert.

---

[8] The government's suggestion that *Silva* rested on a comparison between deportation and exclusion provisions is belied by *Silva* itself, which turns not on linguistic comparisons, but on the fact that the conviction triggered inadmissibility. *Silva*, 16 I. & N. Dec. at 27-28; *see also Hernandez-Casillas*, 20 I. & N. Dec. at 287 "Under *Francis* and *Silva*," a deportable LPR "must have the same opportunity to seek discretionary relief" as a similarly-situated inadmissible LPR.).

Opp. 17). Favoring one deportable LPR over another on the basis of a short trip to Canada is precisely the irrational distinction not defended by the government.

Finally, the government urges this Court to remedy any constitutional violation "by contracting the availability of Section 212(c) relief rather than expanding it." Br. 53. That argument—another that the government has not raised before—fails. First, "ordinarily extension, rather than nullification, is the proper course." *Heckler* v. *Mathews*, 465 U.S. 728, 739 n.5 (1984) (internal quotation marks omitted). Second, the government is unable to articulate *how* the Court could "contract[]" Section 212(c) relief. A ruling that relief is unavailable to *all* deportable LPRs (*cf. Abebe* v. *Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009)) is manifestly contrary to Congress's intent and settled agency interpretations. Br. 19 (acknowledging that Section 212(c) relief is available in deportation proceedings). And denying relief to any LPR "convicted of any aggravated felony" (Br. 53 (internal quotation marks omitted)) is contrary to *St. Cyr*, which recognized that LPRs who pled guilty to such offenses before Section 212(c)'s repeal (including Mr. St. Cyr's aggravated felony drug conviction) remain Section 212(c)-eligible. 533 U.S. at 326. Congress did not repeal Section 212(c) retroactively; the government cannot repeal it in the guise of remedying the irrational distinction that the BIA's new approach has created.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 23 2011
OFFICE OF THE CLERK

No. 10-694

IN THE

Supreme Court of the United States

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

SETH P. WAXMAN
PAUL R.Q. WOLFSON
JAMES L. QUARLES, III
ERIC F. CITRON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

MARK C. FLEMING
Counsel of Record
MEGAN BARBERO
ELIZABETH KENT CULLEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

THE BIA'S NEW POLICY IS ARBITRARY AND CAPRICIOUS 1

A. *Blake* And *Brieva-Perez* Were Impermissibly Retroactive 2

1. The BIA changed the law 2

2. The BIA unreasonably applied *Blake* and *Brieva-Perez* retroactively 10

B. *Blake* And *Brieva-Perez* Are Arbitrary And Capricious On Their Own Merits 15

C. *Blake* And *Brieva-Perez* Create Serious Equal Protection Concerns 21

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Page(s)

Abebe v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009) 23

Blake v. *Carbone*, 489 F.3d 88 (2d Cir. 2007) 16

Boesche v. *Udall*, 373 U.S. 472 (1963) 5

Carachuri-Rosendo v. *Holder*, 130 S. Ct. 2577 (2010) 14, 20

Cordes v. *Gonzales*, 421 F.3d 889 (9th Cir. 2005) 8

Cruz v. *Attorney General*, 452 F.3d 240 (3d Cir. 2006) 6

Davila-Bardales v. *INS*, 27 F.3d 1 (1st Cir. 1994) 6

De Araujo v. *Gonzales*, 457 F.3d 146 (1st Cir. 2006) 8

Hanover Bank v. *C.I.R.*, 369 U.S. 672 (1962) 5

Heckler v. *Mathews*, 465 U.S. 728 (1984) 23

Hem v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006) 8

INS v. *St. Cyr*, 533 U.S. 289 (2001) 10, 12, 13

In re Valette, 2010 WL 3536705 (BIA Aug. 24, 2010) 7

Komarenko v. *INS*, 35 F.3d 432 (9th Cir. 1994) 17

Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 20

Matter of A-A-, 20 I. & N. Dec. 492 (BIA 1992) 6, 7, 22

Matter of Balderas, 20 I. & N. Dec. 393 (BIA 1991) 18, 19

Matter of Blake, 23 I. & N. Dec. 722 (BIA 2005) 2

Matter of Brieva-Perez, 23 I. & N. Dec. 766 (2005) 2, 19, 20

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of Cardona, 2005 WL 3709244 (BIA Dec. 27, 2005) 7

Matter of Esposito, 21 I. & N. Dec. 1 (BIA 1992) 4

Matter of G-A-, 7 I. & N. Dec. 274 (BIA 1956) 6, 17, 19

Matter of Gabryelsky, 20 I. & N. Dec. 750 (BIA 1993) 4

Matter of Granados, 16 I. & N. Dec. 726 (BIA 1979) 3

Matter of Hernandez-Casillas, 20 I. & N. Dec. 262 (Att'y Gen. 1991) 3, 4, 16, 18, 22

Matter of Jimenez-Santillano, 21 I. & N. Dec. 567 (BIA 1996) 4, 17

Matter of L-, 1 I. & N. Dec. 1 (1940) 16

Matter of Louissaint, 24 I. & N. Dec. 754 (BIA 2009) 20

Matter of Mascorro-Perales, 12 I. & N. Dec. 228 (BIA 1967) 12, 17, 18, 19

Matter of Meza, 20 I. & N. Dec. 257 (BIA 1991) 4

Matter of Munoz, 28 Immigr. Rep. B1-1 (BIA Aug. 7, 2003) 5

Matter of Orrosquieta, 2003 WL 23508672 (BIA Dec. 19, 2003) 5

Matter of Patarroyo-Sanchez, 2004 WL 1739093 (BIA June 18, 2004) 8

Matter of R-G-, 8 I. & N. Dec. 128 (BIA 1958) 3

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of Reyes-Manzueta, 2003 WL 23269892 (BIA Dec. 1, 2003) 5

Matter of Rodriguez-Cortes, 20 I. & N. Dec. 587 (BIA 1992) 6

Matter of Silva, 16 I. & N. Dec. 26 (1976) 14, 22

Matter of Tanori, 15 I. & N. Dec. 566 (BIA 1976) 17

Matter of Wadud, 19 I. & N. Dec. 182 (BIA 1984) 3, 17

Motor Vehicle Manufacturers Ass'n of U.S., Inc. v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) 15

Perez-Vargas v. *Gonzalez*, 478 F.3d 191 (4th Cir. 2007) 6

Retail, Wholesale & Department Store Union v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972) 10

SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 10

Serna-Guerra v. *Holder*, 354 Fed. Appx. 929 (2009) 20

Shardar v. *Attorney General*, 503 F.3d 308 (3d Cir. 2007) 6

DOCKETED CASES

Appellee's Brief, *Cordes* v. *Gonzales*, No. 04-15988 (9th Cir. Oct. 12, 2004) 8

Appellee's Brief, *United States* v. *Ubaldo-Figueroa*, No. 01-50376, 2002 WL 32254035 (9th Cir. Oct. 10, 2002) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Respondent's Brief, *Paulo* v. *Holder*, No. 07-71198 (9th Cir. Nov. 12, 2010) 9

STATUTES AND REGULATIONS

8 U.S.C.
§1101 7
§1182 (1994) 16
§1251 (1988) 11

18 U.S.C. §1546 3

8 C.F.R.
§212.3 (2003) 12
§1212.3 ..... 9, 13

OTHER AUTHORITIES

23 A.L.R. Fed. 480 20

IN THE

Supreme Court of the United States

No. 10-694

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

ARGUMENT

THE BIA'S NEW POLICY IS ARBITRARY AND CAPRICIOUS

In 2005 the Board of Immigration Appeals (BIA) departed from consistent agency practice to hold that lawful permanent residents (LPRs) deportable for certain aggravated felonies were categorically ineligible for discretionary relief under Section 212(c). That novel interpretation is impermissibly retroactive, arbitrary and capricious, constitutionally doubtful, and inadequately explained. The government's arguments to the contrary are off-point and unsupported, and they ignore the reality of immigration practice before 2005.

A. *Blake* And *Brieva-Perez* Were Impermissibly Retroactive

1. The BIA changed the law

Petitioner and amici presented detailed evidence that, before the BIA's decisions in *Matter of Blake*, 23 I. & N. Dec. 722 (2005), and *Matter of Brieva-Perez*, 23 I. & N. Dec. 766 (2005), LPRs convicted of aggravated felony crimes of violence could seek Section 212(c) relief. To some of the evidence, the government responds with fine distinctions that bear little relation to actual agency practice. To the rest, the government offers no response at all.

1. The government's position is that, by adding the "crime of violence" subcategory to the "aggravated felony" deportation provision in 1990 without adding a similarly-phrased exclusion provision, Congress rendered a broad swath of LPRs categorically ineligible for Section 212(c) relief. But it nowhere confronts the necessary implication of that position: that Congress imposed this dramatic effect without saying a word about it—though it *simultaneously* used express terms to restrict Section 212(c)'s application to other LPRs, including aggravated felons who served long sentences. Pet. Br. 14-15, 29-30, 44-46. Nothing in the 1990 amendment remotely suggests that Congress meant to render *every* LPR convicted of a "crime of violence" aggravated felony (regardless of sentence) ineligible for relief. The government has no response.[1]

---

[1] The government does not defend the Ninth Circuit's holding that Section 212(c) does not apply to deportable aliens at all. Pet. Br. 28-31.

The government's treatment of *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262 (Att'y Gen. 1991), the leading decision on the statutory-counterpart rule, is similarly evasive. While the government twice quotes the statement that Section 212(c) relief is available when "the asserted ground for deportation is also a ground for exclusion" (Br. 7, 22), it does not even mention Attorney General Thornburgh's statement of how that principle operates *in practice*. The Attorney General identified only "two grounds for deportation hav[ing] no analogue in the grounds for exclusion," namely illegal entry and firearms possession. *Hernandez-Casillas*, 20 I. & N. Dec. at 282 n.4; *see also id.* at 288 (identifying LPRs "convict[ed] for a firearm offense" and "illegal entrants" as unable to satisfy the statutory-counterpart requirement). The Attorney General also approved *Matter of Granados*, which had held an LPR ineligible for relief because his "*[c]onviction* for possession of a concealed sawed-off shotgun is not a specified section 212(a) ground of excludability, *nor a crime involving moral turpitude that would render the respondent excludable.*" 16 I. & N. Dec. 726, 728 (BIA 1979) (emphasis added). The Attorney General's unqualified endorsement of *Granados* and articulation of only non-excludable conduct (illegal entry and firearms convictions) as lacking a statutory counterpart demonstrate that *Granados* correctly stated the law. *Hernandez-Casillas*, 20 I. & N. Dec. at 288.

Matter of Wadud, 19 I. & N. Dec. 182 (BIA 1984), is not to the contrary. Wadud was deportable due to a conviction under 18 U.S.C. §1546, which the BIA had previously held non-excludable in a case *Wadud* cites. *Matter of R-G-*, 8 I. & N. Dec. 128, 129 (BIA 1958) ("there is no specific paragraph of section 212(a) which requires the applicant's exclusion"). Accordingly,

Wadud is no different from cases involving non-excludable firearms offenses (*Granados*) or illegal entry (*Hernandez-Casillas*), because the LPR could not seek Section 212(c) relief in any setting. The BIA later confirmed that *Wadud* turned on the fact that a Section 1546 conviction was not an excludable crime involving moral turpitude (CIMT). *Matter of Jimenez-Santillano*, 21 I. & N. Dec. 567, 572 (BIA 1996) (explaining that *Wadud* reasoned that "no ground of inadmissibility enumerated in section 212(a) of the Act at the time was comparable to *18 U.S.C. §1546*, including section 212(a)(9), the CIMT provision" (emphasis added)). And the Attorney General himself reaffirmed that the touchstone of Section 212(c) eligibility was whether a conviction could form the basis for excludability, stating that an LPR "subject to deportation must have *the same opportunity to seek discretionary relief* as an alien who has temporarily left this country and, upon reentry, *been subject to exclusion*." *Hernandez-Casillas*, 20 I. & N. Dec. at 287 (emphasis added); *see also Matter of Meza*, 20 I. & N. Dec. 257, 259 (BIA 1991) ("[A]s the respondent's conviction ... clearly could also form *the basis for excludability* ..., he is not precluded from establishing eligibility for section 212(c) relief based on his conviction for an aggravated felony." (emphasis added)).[2]

---

[2] The government's other decisions ruled only that LPRs deportable for firearms convictions could not seek relief—an uncontroversial proposition irrelevant to this case. *E.g.*, *Matter of Gabryelsky*, 20 I. & N. Dec. 750, 753 (BIA 1993) (LPR "could not use Section 212(c) ... to waive deportability for his firearms conviction"); *Matter of Esposito*, 21 I. & N. Dec. 1, 10 (BIA 1995) (Section 212(c) cannot "waive deportability on the ground of a firearms offense").

2. The government concedes (Br. 36) that two BIA decisions in aggravated felony cases support Petitioner's position. In fact, at least *eight* unpublished decisions ruled that LPRs deportable for crimes of violence could seek Section 212(c) relief (and some granted it); *three* did likewise for sexual-abuse-of-a-minor aggravated felonies. Pet. Br. 18-19 nn.4-5.[3] These decisions apply the long-settled principle—reaffirmed by *Granados* and *Hernandez-Casillas*—that a deportable conviction satisfies the statutory-counterpart rule if it is also an excludable CIMT. In the BIA's own words, "there is a 'corresponding' ground of inadmissibility" if a crime-of-violence conviction "could make the [LPR] inadmissible ... as an alien convicted of a [CIMT]." *Matter of Munoz*, 28 Immigr. Rep. B1-1 (BIA Aug. 7, 2003) (Pet. App. 52a-53a). Similarly, relief is available where "the aggravated felony at issue ..., namely a crime of violence, would be [a CIMT]." *Matter of Reyes Manzueta*, 2003 WL 23269892 (BIA Dec. 1, 2003) (granting relief in voluntary manslaughter case).

The government asks this Court to disregard these rulings because the BIA declined to publish them—a contention based on one circuit decision forgiving an "apparent inconsistency" with "one" unpublished opinion. Br. 35. But the BIA's unpublished decisions "reveal the interpretation put upon the statute by the agency." *Hanover Bank* v. *C.I.R.*, 369 U.S. 672, 686 (1962); *see also Boesche* v. *Udall*, 373 U.S. 472, 482-483 (1963) (citing string of unpublished agency decisions for

---

[3] Although *Matter of Orrosquieta*, 2003 WL 23508672 (BIA Dec. 19, 2003), involved an inadmissibility charge, the BIA stated that an aggravated felony crime of violence under 8 U.S.C. §1101(a)(43)(F)—a *deportation* provision—is Section 212(c)-eligible.

the proposition that "[f]rom the beginnings of the Mineral Leasing Act the Secretary has conceived that he had the power drawn in question"). There is "no earthly reason why the mere fact of nonpublication should permit [the BIA] to take a view of the law in one case that is flatly contrary to the view it set out in earlier (yet contemporary) cases." *Davila-Bardales* v. *INS*, 27 F.3d 1, 5-6 (1st Cir. 1994); *see also Shardar* v. *Att'y Gen.*, 503 F.3d 308, 315 (3d Cir. 2007); *Perez-Vargas* v. *Gonzalez*, 478 F.3d 191, 193 n.3 (4th Cir. 2007). That is particularly true where, as here, *several* unpublished decisions follow on and apply the Attorney General's and BIA's prior articulation of the law. *Cruz* v. *Att'y Gen.*, 452 F.3d 240, 250 (3d Cir. 2006).

The government's treatment of the *published* decisions in *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587 (BIA 1992), and *Matter of A-A-*, 20 I. & N. Dec. 492 (BIA 1992), is off-point. The government does not dispute that those LPRs were deportable for convictions that would qualify as aggravated felony "crimes of violence"—attempted murder and murder—or that both LPRs were eligible for relief. Instead, it asserts only that they were not *charged* with deportability for an aggravated felony crime of violence. Br. 32-33. That is without significance, because the BIA has long held that, once a waiver is granted, "it would be clearly repugnant to say that the respondent remains deportable *because of the same conviction.*" *Matter of G-A-*, 7 I. & N. Dec. 274, 275-276 (BIA 1956) (emphasis added). Accordingly, *Rodriguez-Cortes* and *A-A-* demonstrated that LPRs deportable for murder or attempted murder convictions could seek a waiver of exclusion that, if granted, would protect them from deportation due to those *convictions*. Indeed, *A-A-* expressly reaffirmed that the context in which the waiver is obtained is ir-

relevant. 20 I. & N. Dec. at 502 n.22 ("[A]n application for section 212(c) relief filed in the context of deportation proceedings is equivalent to one made at the time an alien physically seeks admission into the United States.").

The government speculates (Br. 36) that the possibility that some crime-of-violence convictions "could have been charged" as aggravated felony theft, 8 U.S.C. §1101(a)(43)(G), or "sexual abuse of a minor," *id.* §1101(a)(43)(A), "may have altered" the comparability analysis. A similar argument is made as to murder, which can be charged as "murder, rape, or sexual abuse of a minor." *Id.* §1101(a)(43)(A); Br. 32-33 & n.15. But the government conspicuously fails to assert that *Blake* allows LPRs charged under subsections (A) or (G) to seek Section 212(c) relief. In fact, *Blake* held the exact opposite for "sexual abuse of a minor" under subsection (A), and the BIA held likewise for theft offenses under subsection (G). *In re Valette*, 2010 WL 3536705 (BIA Aug. 24, 2010). As for murder, *Blake* was premised on comments asserting that "aggravated felonies such as 'Murder, Rape, o Sexual Abuse of a Minor'" are *not* waivable. Pet. Br. 21-22. The government's apparent agreement that LPRs charged under those subsections were previously eligible for Section 212(c) relief, whereas the BIA now holds otherwise, confirms that *Blake* was a sea change.

Perhaps the strongest indications that the BIA believed itself to be changing the law are its decisions changing pre-*Blake grants* of relief into *denials* in the same case. Pet. Br. 23 & n.7. When its guard was down, the BIA admitted that its about-face represented a "change in law." *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005) (per curiam). The BIA's later attempt to retract that candid admission (Br. 38)

only highlights the BIA's failure even to acknowledge, much less explain, its U-turn.

3. The government cannot point to a single contemporaneous account consistent with its revisionist view.[4] By contrast, numerous amici who counseled *both* the government and LPRs during the relevant period—including two former INS General Counsels—have advised the Court of their understanding that aggravated felony crimes of violence were waivable provided they triggered excludability. Immigration Officials' Br. 8, 11; NACDL Br. 8-9; NLJC/AILA Br. 2-4, 11-12.

This understanding of the statutory-counterpart requirement was so well-established that the government often did not raise the issue when opposing Section 212(c) relief in crime-of-violence cases. *E.g.*, Appellee's Br. 8-12, *Cordes* v. *Gonzales*, No. 04-15988 (9th Cir. Oct. 12, 2004). LPRs in such cases were granted relief or at least allowed to seek it without any challenge based on the statutory-counterpart requirement. *E.g.*, *Hem* v. *Maurer*, 458 F.3d 1185, 1187-1189 (10th Cir. 2006); *De Araujo* v. *Gonzales*, 457 F.3d 146, 154 (1st Cir. 2006) ("the BIA clearly considered De Araujo for discretionary relief"); *Cordes* v. *Gonzales*, 421 F.3d 889, 893, 898-899 (9th Cir. 2005), *vacated on other grounds*, 517 F.3d 1094 (9th Cir. 2008).

The government argues that these decisions do not "mention" the statutory-counterpart requirement (Br.

---

[4] The government cites *Matter of Patarroyo-Sanchez*, 2004 WL 1739093 (BIA June 18, 2004), which shows at most that the BIA sought to change course slightly earlier than *Blake*. *Patarroyo-Sanchez*, like *Blake*, does not even acknowledge, much less explain, the BIA's deviation from its prior consistent practice.

34), but that is precisely the point: the government apparently failed even to raise such an argument, though it easily would have prevailed under *Blake*'s new rule. Indeed, the government sometimes made arguments directly contrary to *Blake*'s view that Section 212(c) relief was categorically unavailable for crime-of-violence aggravated felonies. *See* Appellee's Br., *United States* v. *Ubaldo-Figueroa*, No. 01-50376, 2002 WL 32254035, at *13 (9th Cir. Oct. 10, 2002) (although "Congress could rationally have decided to eliminate [Section 212(c)] relief altogether for ... crimes of violence," it actually chose a "less expansive approach"). As for its explicit recognition that *Blake* was a "change in the law" (Resp. Br. 16, *Paulo* v. *Holder*, No. 07-71198 (9th Cir. Nov. 12, 2010)) the government responds only that the Ninth Circuit disagreed (Br. 38). That does not make the government's (correct) concession any less revealing.

4. The government addresses the agency's binding regulations only briefly, asserting that a waiver is valid as to the "specific *grounds* of excludability, deportability or removability that were described in the application." Br. 42 (quoting 8 C.F.R. §1212.3(d)). But this language proves Petitioner's point. LPRs seeking relief are not asked to "describe[] in the application" any specific excludability, deportability, or removability *subsections*; indeed, the form does not mention deportability at all. Rather, the application seeks the "reasons" the LPR believes he or she is "inadmissible" and specifies that "if the application is made because you may be inadmissible due to *a conviction of a crime, state ... the crime* [in the application]." Pet. Br. App. 23a, 24a. Accordingly, when the regulations refer to "grounds," they refer unambiguously to excludable *convictions* that can be "described in the application."

2. The BIA unreasonably applied *Blake* and *Brieva-Perez* retroactively

Each of the five *Retail, Wholesale* factors—which the government does not dispute appropriately implement this Court's balancing test (Br. 43)—recommends against retroactive application of the BIA's new policy.

1. The government grudgingly concedes, but seeks to minimize, the burden of retroactivity on Petitioner. Br. 43. Mandatory deportation is a terrifying sanction for LPRs who came to America as children; few if any civil orders are more harmful to an individual than deportation from the country that he and his family have called home for decades. Pet. Br. 42-43; *INS* v. *St. Cyr*, 533 U.S. 289, 325 (2001) ("There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation").

2. As demonstrated above (at pp. 2-9), *Blake* and *Brieva-Perez* represented and were acknowledged as an abrupt change in law. The suggestion that the BIA in 2005 encountered only a "new factual situation" (Br. 43) is plainly incorrect: several prior BIA decisions considered whether LPRs deportable for excludable crimes of violence satisfied the statutory-counterpart rule and confirmed that they did—a conclusion consistent with Attorney General Thornburgh's articulation of the law in 1991. *See supra* pp. 3-5.

Moreover, in considering the "ill effect" or "inequity" of retroactivity, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947); *Retail, Wholesale & Dep't Store Union* v. *NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972), the question is not whether the government can cleverly reinterpret BIA decisions in hindsight, but whether LPRs would reasonably have "belie[ved] in their continued eligibility" *at the time*. *St. Cyr*, 533 U.S. at 323. As explained

above and by amici, an LPR would have reasonably relied on the availability of relief for a "crime of violence" conviction; that is what the criminal defense bar, the immigration bar, two INS General Counsels and several trial attorneys in the two administrations immediately preceding *Blake* would have advised. The government agreed, when it suited its purposes. *See supra* p. 9. In these circumstances—where the regulated individuals and their counsel would reasonably perceive a change in law—retroactivity is most inequitable.

The government asserts that the issue was "evolving," because there were "no precedential opinions on point." Br. 43. That is incorrect; several published opinions strongly supported Petitioner's understanding of the statutory-counterpart requirement, including *Hernandez-Casillas*, *Meza*, *Granados*, and others described below at pp. 16-17. Moreover, the Court should not allow the government to dismiss the numerous unpublished decisions applying those precedents favorably to LPRs in utterly indistinguishable cases—a rule that would allow the agency to evade APA review by manipulating its publication practices.

3. The government argues that retroactive application is appropriate because an LPR in Petitioner's *particular* position would not have relied on the prior state of the law as he supposedly "did not become deportable" until 1996. Br. 45. This argument, raised for the first time in the government's merits brief, is wrong for four reasons.

First, Petitioner was deportable when he pled guilty. He traveled to the Philippines in 1987 for his grandmother's funeral; his 1989 plea thus made him deportable for conviction of a CIMT committed within five years after entry. 8 U.S.C. §1251(a)(4) (1988).

Second, the government's invocation of individual reliance is misplaced, because the BIA adopted a *categorical* approach that applies regardless of any individual's particular situation. The government cannot justify the policy's retroactivity as to *all* LPRs by questioning a specific LPR's reliance. And looking to the "great number of defendants in [Petitioner's] position," *St. Cyr*, 533 U.S. at 323, there will be many who reasonably would have relied on Section 212(c) availability as the *quid* for the *quo* of a plea bargain. *See* Br. 44 (conceding reasonable reliance interest of certain LPRs).

Third, an LPR who pleaded guilty before 1996 to an offense that was excludable but not deportable could reasonably have relied on the availability of Section 212(c) in the event that Congress expanded the category of deportable offenses, which Congress had already done in 1988. *See St. Cyr*, 533 U.S. at 295-296 (describing broadening of set of deportable offenses, including through the Anti-Drug Abuse Act of 1988). Before *Blake*, the agency allowed an LPR with an excludable offense to apply for Section 212(c) relief *at any time*, whether in exclusion proceedings, deportation proceedings, or no proceeding (Pet. Br. App. 22a-23a (Form I-191); 8 C.F.R. §212.3(a), (b) (2003)) and recognized that a grant of relief in *any* context would preclude deportation based on the same conviction alone. *See Matter of Mascorro-Perales*, 12 I. & N. Dec. 228, 230 (BIA 1967). Thus, in pleading guilty, an LPR could reasonably have relied on the present *excludability* of

the offense as sufficient to preserve effective relief from future deportation.[5]

Indeed, the government's assertion that reliance is only possible where the LPR's plea triggers immediate deportability makes no sense. An LPR pleading guilty could not possibly know what deportation charges might someday be lodged; as the government acknowledges (Br. 35-36), many crimes meet multiple deportation provisions, which have been amended repeatedly. Nor could the LPR know whether an *as yet unenacted* deportation provision would have similar language or scope to an exclusion provision. But the LPR *could* know whether the crime qualified as a waivable CIMT. Before *Blake*, that was all that was needed to preserve eligibility for relief if the conviction later became a basis for deportation. *See* Pet. Br. 17-19; NACDL Br. 8 (*Blake* "is contrary to how these lawful permanent resident defendants were advised in connection with their pre-1996 guilty pleas").

Fourth, LPRs in Petitioner's situation could separately have relied on pre-*Blake* law by not leaving the country—a fact that was irrelevant before *Blake*, but that, under the government's view, now makes all the difference. Cert. Opp. 17; *see also* Br. 51-52 (suggesting that LPRs should also report themselves as inadmissible). But LPRs should not be penalized for failing to take that step before the BIA suggested it was needed, especially given the BIA's longstanding holding that

---

[5] Even current agency regulations make Section 212(c) relief available to LPRs who pleaded guilty to qualifying offenses regardless of whether the plea triggered deportability at the time. 8 C.F.R. §§1212.3(f)(4)(ii), 1212.3(h)(1).

prior departures are unimportant. *Matter of Silva*, 16 I. & N. Dec. 26, 30 (1976).

4. This is the rare case in which the government's interest in retroactive application is minimal because ultimate relief remains discretionary. Pet. Br. 43. The government's two responses are unpersuasive.

First, the government argues that the BIA has an interest in ensuring that its supposedly "sound interpretation" prevail. Br. 46. That interest, which agencies can assert in *every* case, does not compel retroactive application of a policy in the face of weighty countervailing interests. The agency's interest is also unusually attenuated here because, even without retrospective application of *Blake*, relief still "depends on the discretion of the Attorney General." *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2589 (2010).

Second, the government claims that application of the statutory-counterpart rule "at a different level of generality" would "increase the costs of deciding who is eligible." Br. 46. But the only additional analysis required is whether the deportable crime is also excludable, a question on which routine agency consideration has produced decades of settled law, leaving it often—as here—undisputed. Br. 11 (admitting voluntary manslaughter is an excludable CIMT).

In any event, the administrative costs in adjudicating applications (Br. 47) do not outweigh the other factors. The *balance* here is clear: the change was sudden and complete; the reliance interests are serious; the burden imposed is severe; and the statutory interest in retroactivity is attenuated at best. There is no ade-

quate reason to apply the BIA's new policy retroactively.[6]

B. *Blake* And *Brieva-Perez* Are Arbitrary And Capricious On Their Own Merits

Even without regard to retroactivity, the BIA's policy is arbitrary and capricious.

1. By making eligibility "turn[] on whether Congress has employed similar language to describe substantially equivalent categories of offenses" in specific deportation or exclusion subsections, *Blake*, 23 I. & N. Dec. at 728, the BIA is manifestly "rel[ying] on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Congress nowhere suggested that its choice of language in deportation and exclusion provisions determined Section 212(c) eligibility. Pet. Br. 44-46. And Congress twice expressly limited Section 212(c) relief *without* suggesting that LPRs deportable for aggravated-felony crime-of-violence convictions were categorically ineligible. *Supra* p. 2; Pet. Br. 14-17.

The government has refused to address this point *at all*, instead venturing a plain-text argument based not on Section 212(c)'s plain text, but on a paraphrase. Section 212(c) is not "phrased in terms of waiving statutorily specified grounds of exclusion." Br. 21. Rather, it provides that certain LPRs "may be admitted in the discretion of the Attorney General without regard to [many of] the provisions of subsection (a)."

---

[6] The government does not deny that, if *Blake* changed the law, the BIA neither acknowledged nor explained the change. Pet. Br. 53-55.

8 U.S.C. §1182(c) (1994). The straightforward application of that text in deportation cases is to treat a deportable LPR as eligible for relief if the LPR is inadmissible under any of the enumerated "provisions of subsection (a)." Attorney General Thornburgh stated as much: "an alien subject to deportation must have the same opportunity to seek discretionary relief as an alien who has temporarily left this country and, upon reentry, been subject to exclusion." *Hernandez-Casillas*, 20 I. & N. Dec. at 287. Certainly nothing in Section 212(c) directs the BIA to compare the terminology of exclusion and deportation provisions, which are crafted to determine who is excludable and deportable, not who is eligible for Section 212(c) relief. *Blake* v. *Carbone*, 489 F.3d 88, 102 (2d Cir. 2007) (BIA's focus on the language of removability provisions is "strange"). Yet the government offers no other justification for *Blake*.

2. Petitioner demonstrated that the BIA's policy revives the distinction between deportable LPRs who traveled abroad and returned (and could seek relief from exclusion *nunc pro tunc*) and LPRs who did not—a distinction the agency disavowed 35 years ago in *Silva*. In its brief opposing certiorari, the government agreed, representing that "Petitioner could have easily avoided [*Blake*'s] effects by departing the country voluntarily at any point before his removal proceedings were initiated." Cert. Opp. 17.

The government's petition-stage position is correct. As Attorney General Jackson explained in *Matter of L-*, 1 I. & N. Dec. 1, 5 (1940), an LPR should not be in a 'worse position because he was admitted without challenge ..., so that his appeal to discretion must be presented in deportation rather than in exclusion proceedings." Thus, an LPR in deportation proceedings who

reentered following an excludable offense may seek relief *nunc pro tunc* as though in exclusion proceedings, and "if [Section 212(c)] is exercised to waive a ground of inadmissibility based upon a criminal conviction, a deportation proceeding cannot thereafter be properly instituted *based upon the same criminal conviction.*" *G-A-*, 7 I. & N. Dec. at 275 (emphasis added); *see also Mascorro-Perales*, 12 I. & N. Dec. at 230.

In its merits brief, however, the government ventures yet another change in the law, arguing that *L-* and *G-A-* were "nullified" by a footnote in *Wadud*. Br. 29 (citing 19 I. & N. Dec. at 185 n.3). That argument—which the government has not previously raised—is surprising, given that *Wadud* does not even cite *L-* or *G-A-*, let alone purport to overrule them. The government points to the BIA's withdrawal from "language" in another decision, *Matter of Tanori*, 15 I. & N. Dec. 566 (BIA 1976), but that language appeared to allow an LPR to argue that the egregiousness of the "facts" of his offense could turn a conviction for a non-excludable crime (such as a firearms offense) into an excludable CIMT. *E.g.*, *Komarenko* v. *INS*, 35 F.3d 432, 435 (9th Cir. 1994) (rejecting LPR's argument that the "factual basis" for a firearms conviction could affect Section 212(c) eligibility); *Jimenez-Santillano*, 21 I. & N. Dec. at 572 (noting that Wadud contended he was Section 212(c)-eligible because "the crime underlying his conviction under 18 U.S.C. §1546 and his deportability under section 241(a)(5) was arguably a CIMT"). *Wadud* nowhere disturbed the longstanding ruling of *G-A-* that an LPR deportable for *a conviction* that constitutes a CIMT and who departed and returned may obtain a waiver of inadmissibility, which then operates as relief from deportation based on that conviction.

That *L-* and *G-A-* are still good law was confirmed when, over six years after *Wadud*, the government asked the Attorney General to "reconsider[]" the *nunc pro tunc* practice established by "*Matter of L-*, *Matter of S-*, [6 I. & N. Dec. 392 (BIA 1954)], and *Matter of G-A-*," and he "*decline[d] to do so.*" *Hernandez-Casillas*, 20 I. & N. Dec. at 284 n.6, 286 (emphasis added). On the contrary, he reaffirmed that practice: an LPR who had been "inadvertently permitted ... to reenter this country notwithstanding his excludability" is "permitted ... to raise any claim for discretionary relief that the alien otherwise could have raised had he been excluded." *Id.* at 283-284. By denying non-departing LPRs the discretionary relief available to returning LPRs under *Hernandez-Casillas* and *G-A-*, the BIA has revived the very distinction the agency has repeatedly rejected.

The government asserts, without citation, that there is a "clear difference" between giving a waiver of exclusion "that has already been granted" the effect of waiving deportation and "waiv[ing] in the first instance a ground of deportability that is insufficiently like a ground of inadmissibility." Br. 25. Whatever that "clear difference" might be—the government does not identify it—the agency has never recognized it. Rather, the BIA has stated the opposite: "if a single act can be the basis of both excludability and deportability, and excludability is waived ..., then that act, without more, cannot be the basis of a deportation charge." *Mascorro-Perales*, 12 I. & N. Dec. at 230. Indeed, Section 212(c) applications, even those submitted in deportation proceedings, are always framed as requests for waivers of "inadmissib[ility]." Pet. Br. App. 23a (directing LPRs to list "[r]easons" why they "may be inadmissible"); 8 C.F.R. §1212.3(a), (e). Once the waiver is granted, it remains "valid indefinitely for all proceedings, including both de-

Respectfully submitted.

SETH P. WAXMAN
PAUL R.Q. WOLFSON
JAMES L. QUARLES, III
ERIC F. CITRON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

MARK C. FLEMING
Counsel of Record
MEGAN BARBERO
ELIZABETH KENT CULLEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

SEPTEMBER 2011

AMICUS CURIAE BRIEF

No. 10-694

FILED
JUL 12 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOEL JUDULANG,

Petitioner,

—v.—

ERIC H. HOLDER, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CATHOLIC LEGAL IMMIGRATION NETWORK, INC., AND WORLD RELIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

IRA J. KURZBAN
Counsel of Record
KURZBAN, KURZBAN, WEINGER, TETZELI & PRATT P.A.
2650 S.W. 27th Avenue, 2nd Floor
Miami, Florida 33133
(305) 444-0060
ira@kkwtlaw.com

Attorneys for Amici Curiae

Library of Congress

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

BACKGROUND 4

ARGUMENT 7

I. THE BIA'S RULE DENYING § 212(C) ELIGIBILITY BASED SOLELY ON AN LPR'S REMAINING IN THE UNITED STATES CONTRAVENES CONGRESSIONAL INTENT AND FORECLOSES § 212(C)'S CRITICAL FUNCTION AS A DISCRETIONARY PROVISION OF MERCY AND FORGIVENESS FOR DESERVING LONG-TIME LAWFUL RESIDENTS 7

II. THE NINTH CIRCUIT'S HYPOTHESIS IN *ABEBE* IS UNSUPPORTED AND IRRATIONAL .. 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Abebe v. Holder, 577 F.3d 1113 (9th Cir. 2009) 7
Abebe v. Mukasey, 554 F.3d 1203 (9th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010) 6, 11, 19
In re Acosta-Campos, 2004 WL 2374871 (BIA Aug. 18, 2004) 14
Matter of Arias-Uribe, 13 I. & N. Dec. 696 (BIA 1971) 5, 6
Avilez-Granados v. Gonzales, 481 F.3d 869 (5th Cir. 2007) 15
Matter of Arreguin de Rodriguez, 21 I. & N. Dec. 38 (BIA 1995) 15
Matter of Blake, 23 I. & N. Dec. 722 (BIA 2005) 6
In re Bowen, 2007 WL 275726 (BIA Jan. 11, 2007) 12, 13
Matter of Bulnes-Nolasco, 25 I. & N. Dec. 57 (BIA 2009) 17
Matter of Cardiel-Guerrero, 25 I. & N. Dec. 12 (BIA 2009) 18
Castaneda-Sanchez v. Holder, 396 Fed. App'x 84 (5th Cir. 2010) 13
Catney v. INS, 178 F.3d 190 (3d Cir. 1999) 16
In re Cushicagua-Peralta, 2006 WL 2008289 (BIA May 31, 2006) 12
In re De La Cruz, 2010 WL 4509731 (BIA Oct. 29, 2010) 12
Matter of Dominos Dias Goncalves, No. A34 744 205, 26 Immig. Rptr. (MB) B1-117 (BIA Nov. 25, 2002) 13
In re Donaldson, 2005 WL 3802267 (BIA Nov. 28, 2005) 13

In re Emordi, 2006 WL 2391253
(BIA June 22, 2006) 13
Francis v. INS, 532 F.2d 268
(2d Cir. 1976) 5, 6, 7, 10
Francois v. Attorney Gen. of U.S.,
264 Fed. App'x 211(3d Cir. 2008) 13
Matter of G-----, 2 I. & N. Dec. 235 (BIA 1945). 19
Matter of G-A-, 7 I. & N. Dec. 274 (BIA 1956) 5
Gallegos-Vasquez v. Holder, 636 F.3d 1181
(9th Cir. 2011) 15
Gonzalez v. INS, 996 F.2d 804 (6th Cir. 1993) 15
Matter of Granados, 16 I. & N. Dec. 726
(BIA 1979) 18
Henderson v. INS, 157 F.3d 106
(2d Cir. 1998) 16
INS v. St. Cyr, 533 U.S. 289 (2001) 4, 5, 12, 18
Kwong Hai Chew v. Colding,
344 U.S. 590 (1953) 8
Matter of L, 1 I. & N. Dec. 1 (1940)
(Jackson, A.G.) 5
Landon v. Plasencia, 459 U.S. 21 (1982) 9
In re Lobaina-Gil, 2009 WL 3713244
(BIA Oct. 26, 2009) 12, 13
Low Wah Suev v. Backus, 225 U.S. 460 (1912) 9
Matter of Marin, 16 I. & N. Dec. 581 (BIA 1978) 11
In re Marine Nunez, 2003 WL 23270113
(BIA Oct. 28, 2003) 14
Marti-Xiques v. INS, 713 F.2d 1511
(11th Cir. 1983), modified on other grounds by
741 F.2d 350 (11th Cir. 1984) 18
Mathews v. Diaz, 426 U.S. 67 (1976) 10
In re Mclean, 2004 WL 1739118
(BIA June 17, 2004) 13
Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997),
aff'd in part, dismissed in part sub nom 16

In re Murray, 2004 WL 2943520
(BIA Oct. 29, 2004) 13
Nakaranurack v. United States,
68 F.3d 290 (9th Cir. 1995) 6, 17
In re Ochoa de Fuentes, 2004 WL 1059687
(BIA Jan. 9, 2004) 11
In re Olajope, 2009 WL 4899011
(BIA Nov. 27, 2009) 12, 15
In re Pupo, 2009 WL 3713308
(BIA Oct. 28, 2009) 12, 13
In re Quinones, 2010 WL 3157442
(BIA July 27, 2010) 13
In re Raola-Rosaria, 2004 WL 2418656
(BIA Sept. 1, 2004) 13
In re Salinas-Flores, 2008 WL 655909
(BIA Feb. 15, 2008) 12
Shaughnessy v. United States ex rel. Mezei,
345 U.S. 206 (1953) 10
Matter of Silva, 16 I. & N. Dec. 26 (BIA 1976) 5
Tapia-Acuna v. INS, 640 F.2d 223
(9th Cir. 1981) 6, 7
In re Telleria, 2009 WL 3713330
(BIA Oct. 29, 2009) 10
United States ex rel. Tisi v. Tod,
264 U.S. 131 (1924) 9
United States v. Copeland,
369 F. Supp. 2d 275 (E.D.N.Y. 2005),
aff'd, 232 Fed. App'x 72 (2d Cir. 2007) 13
In re Uribe-Rocha, 2010 WL 4500864
(BIA Oct. 28, 2010) 18

STATUTES AND REGULATIONS

8 C.F.R. § 245a.11(c) 8
39 Stat. 875, § 3 (1917) 4

1891 Immigration Act, 26 Stat. 1084 (1891) 11
1924 Immigration Act, Pub. L. No. 68-139,
43 Stat. 153, § 14 (1924) 12
1940 Alien Registration Act,
54 Stat. 670, § 40 (1940) 12
1952 INA, Pub. L. No. 82–414,
66 Stat. 163 (1952) 12
Alien Contract Labor Law, 25 Stat. 566 (1888) 11
Alien Friends Act, Act of June 25,
1798, ch. 58, § 1, 1 Stat. 570, 570-71 (1798) 4
Immigration Act of 1917, 39 Stat. 875 (1917),
§ 3 (Seventh Proviso) 4
INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) 9
INA § 101(a)(27)(I), 8 U.S.C. § 1101(a)(27)(I) 8
INA § 101(a)(43)(R), 8 U.S.C. § 1101(a)(43)(R) 18
INA § 101(g), 8 U.S.C. § 1101(g) 17
INA § 208(a)(1), 8 U.S.C. § 1158(a)(1) 9
INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i). 19
INA § 212(c), 8 U.S.C. § 1182(c) .....passim
INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii.. 18
INA § 240A(a), 8 U.S.C. § 1229b(a) 4
INA § 240A(a)(2), 8 U.S.C. § 1229b(b)(2) 12
INA § 240A(b)(1)(A), 8 U.S.C. § 1229b(b)(1)(A). 8
INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) 12
INA § 240A(b)(2)(A)(ii), 8 U.S.C. § 1229b(b)(2)(A)(ii) 8
INA § 244(c)(1), 8 U.S.C. § 1254a(c)(1 8
INA § 245(i)(1), 8 U.S.C. § 1255(i)(1) 9
INA § 245A(a)(3), 8 U.S.C. § 1255a(a)(3) 8
INA § 301, 8 U.S.C. § 1401 9
INA § 316(a), 8 U.S.C. § 1427(a) 9
INA § 319 (a), 8 U.S.C. § 1430(a) 9
Pub. L. No. 863, 62 Stat. 1206 (1948) 12
Pub. L. No. 82-414, 66 Stat. 163 (1952) 4
Pub. L. No. 885, 76 Stat. 1247 (1962) 12

Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996) 4

OTHER AUTHORITIES

Edward P. Hutchinson, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965 (1981) 8
Mirta Ojito, *Old Crime Returns to Haunt an Immigrant*, N.Y. TIMES, Oct. 15, 1997, at B1 16
U.S. Rep. Zoe Lofgren, A Decade of Radical Change in Immigration Law: An Inside Perspective, 16 STAN. L. & POL'Y REV. 349, 360 (2005) 16

INTERESTS OF *AMICI CURIAE*

Amici curiae, the Catholic Legal Immigration Network, Inc. (CLINIC), and World Relief respectfully submit this brief in support of petitioner Joel Judulang.[1] The Catholic Legal Immigration Network, Inc. (CLINIC), a national religious organization established in 1988, is the largest network of immigration legal service providers in the country, assisting more than 600,000 people annually with immigration matters. CLINIC was created by the United States Conference of Catholic Bishops to support a rapidly growing network of community-based immigration programs. CLINIC's network originally comprised 17 programs. It has since increased to more than 201 diocesan and other affiliated immigration programs with 290 field offices in 47 states. The network currently employs roughly 1,200 attorneys and accredited paralegals.

Among CLINIC's and our network's clients, parishioners, and community members are numerous lawful permanent residents who have lived in the United States for many years, in some instances for their entire adult lives; who have married and raised children in this country; who have overcome their past mistakes, including decades-old criminal convictions, often with the help

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

of religious faith and counseling; who have paid their taxes, founded businesses, and created charitable organizations; and who have become pillars, leaders, and invaluable members of their local communities as well as our national fabric.

As a religious organization, we are particularly alarmed by misinterpretations of immigration law that fail to take account of true rehabilitation, often achieved with the support of a community of faith. We fear that a rule precluding a form of longstanding immigration relief that offers a discretionary opportunity for forgiveness and mercy to those who have continuously remained in this country, often for decades, would penalize those lawful permanent residents whose ties to this country are strongest and who contribute most to the economic, social, and religious communities of the United States.

Amicus curiae World Relief is a religious international relief and development organization committed to serving the most vulnerable populations, through partnerships with faith-based and community-based organizations. Originally founded in 1944 as the War Commission of the National Association of Evangelicals to assist victims of World War II, World Relief currently works on five continents, in some of the most impoverished areas of the world. In the United States, World Relief focuses on serving the foreign-born, including providing immigration legal services to refugees, asylees, parolees, and other vulnerable immigrants in twenty cities around the country. Since 1979, World Relief has resettled more than 236,000

refugees in the U.S. under a cooperative agreement with the Department of State. World Relief also supports churches in developing immigration legal services programs.

Many of World Relief's clients and church and community members are lawful permanent residents who have lived in the United States for many years. They have made countless contributions to their families, communities, places of worship, and this country. Many have overcome prior criminal and other problems and achieved rehabilitation, often with the assistance of faith-based organizations. World Relief believes that such rehabilitation should be adequately considered under immigration law.

SUMMARY OF ARGUMENT

The Board of Immigration Appeals' (BIA) recent and sudden reinterpretation of former Immigration and Nationality Act (INA) § 212(c) improperly distinguishes between two sets of lawful permanent residents (LPRs) within our borders: those who have not traveled abroad and are therefore rendered ineligible for relief, and others who do leave and return and thereby remain eligible. This BIA rule contravenes consistent congressional immigration policy, which has always encouraged lawful permanent residents to remain physically within the United States. It will inflict, and already has inflicted, needless suffering on valuable members of our communities who received no notice of this about-face regarding § 212(c) relief that cut off a 70-year tradition of allowing the exercise of

discretionary mercy in deserving cases of rehabilitation.

BACKGROUND

For over 70 years, long-term lawful permanent residents ("LPRs") have been eligible for a discretionary waiver of deportation.[2] The authority to issue such a waiver was initially enacted in the seventh proviso to the Immigration Act of 1917,[3] and later reaffirmed in substantially the same manner by former Immigration and Nationality Act ("INA") § 212(c), 8 U.S.C. § 1182(c).[4] Section 212(c) was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[5] and replaced by the more restrictive cancellation of removal, current INA § 240A(a), 8 U.S.C. § 1229b(a). However, this Court, in INS v. St. Cyr, 533 U.S. 289, 326 (2001), preserved the § 212(c) eligibility of aliens who pled guilty or no contest prior to the effective date of IIRIRA.

---

[2]The congressional policy of retaining flexibility to relieve deserving aliens from deportation long predates these waiver provisions. See, e.g., Alien Friends Act, Act of June 25, 1798, ch. 58, § 1, 1 Stat. 570, 570-71 (1798) (granting the President authority to order dangerous or treasonous aliens removed while maintaining his ability to issue discretionary "licenses" to remain).

[3]39 Stat. 875, § 3 (1917) ("[A]liens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General, and upon such conditions as he may prescribe.").

[4] Pub. L. No. 82-414, 66 Stat. 163 (1952).

[5] Pub. L. 104-208, Div. C, 110 Stat. 3009-546 (1996).

Facially, both the seventh proviso and § 212(c) relate only to LPRs returning from abroad. But for more than 70 years and to this day, the BIA has held without interruption that such waivers are also available *nunc pro tunc* to an LPR who has left the U.S. and returned after his or her conviction and before deportation proceedings against the alien are initiated. See Matter of L, 1 I. & N. Dec. 1 (1940) (Jackson, A.G.); Matter of G- A-, 7 I. & N. Dec. 274 (BIA 1956); see also St. Cyr, 533 U.S. at 294.

Initially, in Matter of Arias-Uribe, the BIA held that an LPR could *only* apply for a § 212(c) waiver if the alien had travelled abroad since his or her conviction. 13 I. & N. Dec. 696, 697-98 (BIA 1971). But, in Francis v. INS, the Court of Appeals for the Second Circuit rejected this rule on equal protection grounds. 532 F.2d 268, 273 (2d Cir. 1976). *Francis* reasoned that it was irrational to prohibit an LPR from even applying for a discretionary waiver when another LPR, identical in every respect except that the alien left the U.S. and returned at some point after conviction, would be eligible to seek a favorable exercise of discretion. Id. The court pointed out that "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive *at least as much* consideration as an individual who may leave and return from time to time." Id. (emphasis added).

This holding was quickly adopted by the BIA,[6] as well as by every other Circuit Court of Appeals.[7]

However, in 2005, the BIA announced a new rule: § 212(c) relief would only be available to a "nondeparting" LPR if the ground on which the alien is found to be deportable used "similar language" to a ground of inadmissibility. Matter of Blake, 23 I. & N. Dec. 722 (BIA 2005). Because the underlying *nunc pro tunc* rule was undisturbed, the result was that, as in Francis, two LPRs identical in every respect except that one left the country and returned, while the other did not, must be treated differently in assessing their eligibility for a discretionary waiver that is frequently described as the "'forgiveness' provision" of the INA. See, e.g., Nakaranurack v. United States, 68 F.3d 290, 292 (9th Cir. 1995).

In Abebe v. Mukasey, upon which the Ninth Circuit relied in deciding the instant case, the court reasoned that Francis, and the Ninth Circuit's own subsequent decision in Tapia-Acuna, had overlooked Congress's supposedly rational interest in "encouraging [the] self-deportation" of LPRs in order to "save resources [the government] would otherwise devote to arresting and deporting" them. 554 F.3d 1203, 1206 (9th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010). Abebe therefore overruled Tapia-Acuna, suggesting that the BIA could return to the rule it originally announced in Matter of Arias-Uribe, permitting an LPR's § 212(c) eligibility to

---

[6] Matter of Silva, 16 I. & N. Dec. 26 (BIA 1976).

[7] See, e.g., Tapia-Acuna v. INS, 640 F.2d 223, 225 (9th Cir. 1981).

turn solely on whether or not the alien travelled abroad after a conviction.

In ruling this way, Abebe misconstrued Tapia-Acuna, stating Tapia-Acuna's holding to be that "there's no rational basis for providing section 212(c) relief from inadmissibility, but not deportation." Id. at 1207. Tapia-Acuna instead held that "eligibility for [§ 212(c)] relief cannot constitutionally be denied to an otherwise eligible alien . . . whether or not the alien has departed from and returned to the United States after the conviction giving rise to deportability." 640 F.2d at 225. In other words, in Tapia-Acuna, as in Francis, the relevant comparison is why § 212(c) relief is available to one alien in deportation proceedings but not to a similarly situated person, solely on the basis that the first left and returned after conviction while the second did not. See Abebe v. Holder, 577 F.3d 1113 (9th Cir. 2009) (Berzon, J., dissenting from denial of full court rehearing) ("[Abebe is] based on a fundamental misunderstanding of Tapia-Acuna's holding.").

ARGUMENT

I. THE BIA'S RULE DENYING § 212(C) ELIGIBILITY BASED SOLELY ON AN LPR'S REMAINING IN THE UNITED STATES CONTRAVENES CONGRESSIONAL INTENT AND FORECLOSES § 212(C)'S CRITICAL FUNCTION AS A DISCRETIONARY PROVISION OF MERCY AND FORGIVENESS FOR DESERVING LONG-TIME LAWFUL RESIDENTS.

From the beginning of the Republic, it has been the consistent policy of the United States, expressed through statutory enactments, to encourage lawful alien residents to remain in the United States, and to discourage them from departing. "It is . . . clear from the early discussions of immigration problems and policies in and out of Congress that the most highly approved immigrant was one who came with the intention of remaining permanently, becoming a citizen, and bringing his family or establishing it after arrival."[8] Conversely, early Congresses held a "long-standing prejudice against the 'bird of passage' and 'habitual commuter' who came and went without putting down roots."[9]

Congress has continued to encourage aliens to remain in the United States in modern immigration law by making physical presence a prerequisite for various kinds of immigration benefits. For example, both non-LPR cancellation of removal[10] and cancellation of removal under the Violence Against Women Act of 1994[11] require certain periods of continuous physical presence, as do Temporary Protected Status[12] and legalization under the Immigration Reform and Control Act of 1986.[13]

---

[8] Edward P. Hutchinson, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965 (1981), 505.

[9] Id.

[10] INA § 240A(b)(1)(A), 8 U.S.C. § 1229b(b)(1)(A).

[11] INA § 240A(b)(2)(A)(ii), 8 U.S.C. § 1229b(b)(2)(A)(ii).

[12] INA § 244(c)(1), 8 U.S.C. § 1254a(c)(1).

[13] INA § 245A(a)(3), 8 U.S.C. § 1255a(a)(3); see also 8 C.F.R. § 245a.11(c) (physical presence requirement for LIFE Act legalization); INA § 101(a)(27)(I), 8 U.S.C. § 1101(a)(27)(I)

Various other immigration benefits require the applicant to be physically present at the time of the application.[14] Congress has expressed its desire that LPRs in particular remain in the country by, for example, mandating that to be eligible to naturalize an LPR normally must have continuously resided in the U.S. for five years with actual physical presence for at least half that time.[15] This requirement is echoed in various other special naturalization provisions.[16]

This Court has consistently recognized and reaffirmed Congress's policy of encouraging physical presence within the United States in order to develop the especially strong community and family "ties that go with permanent residence." Landon v. Plasencia, 459 U.S. 21, 32 (1982). Landon recognized the line of cases affording greater procedural protections to "continuously present residents" facing deportation. Id. (citing United States ex rel. Tisi v. Tod, 264 U.S. 131, 133, 134 (1924); Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912); Kwong Hai Chew v. Colding, 344 U.S. 590, 598 n.8 (1953)). In light of the brevity of her absence

---

(physical presence requirement for Special Immigrant visas for retired employees of international organizations and family members of employees of such organizations).

[14] See, e.g., 8 U.S.C. § 1158(a)(1) (asylum); INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (T-visa); INA § 245(i)(1), 8 U.S.C. § 1255(i)(1).

[15] INA § 316(a), 8 U.S.C. § 1427(a).

[16] See, e.g., INA § 319(a), 8 U.S.C. § 1430(a) (physical presence requirement for naturalization of battered spouses and children); see also INA § 301, 8 U.S.C. § 1401 (physical presence requirements for parents of children seeking naturalization by birth).

and the length of her residence, the Court held that Plasencia was entitled to due process as a returning LPR. Id.; see also Chew, 344 U.S. at 596. However, the Court warned, "[i]f the permanent resident alien's absence is extended" she may lose her claim to be treated as "an alien continuously residing and physically present in the United States." Landon, 459 U.S. at 33. The Court distinguished Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), as involving a much more extended absence, one long enough to interrupt even Mezei's considerable prior ties to the U.S. Id. at 33-34. The principle is clear: the longer and more consistently residents remain in the United States, the greater their benefits and protections.

As far as *Amici* are aware, Congress has never enacted an immigration provision that explicitly provided for the preferential treatment of lawful permanent residents who left the U.S. and returned, or for the disadvantageous treatment of similarly situated residents who never left the country. On the contrary, Congress's consistent policy to encourage residents to remain in the country with their families and communities suggests that, if anything, Congress has always intended more favorable treatment of residents who remain in the country longer and more continuously, "have a greater affinity with the United States," and are therefore "most like citizens." Mathews v. Diaz, 426 U.S. 67, 83 (1976); see also Francis, 532 F.2d at 273 ("Reason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an

individual who may leave and return from time to time.").

Abebe's contrary result is particularly worrisome because, in *Amici*'s experience, most contemporary applicants for § 212(c) relief are long-time LPRs who have some or all of the qualities Congress and the BIA have for many decades identified as being particularly desirable in LPRs and as critically important in determining whether to grant discretionary relief. See, e.g., Matter of Marin, 16 I. & N. Dec. 581, 584-85 (BIA 1978) ("Favorable considerations . . . include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character."). Congress has never suggested that it disagrees with this over-forty-year-old assessment of meritorious factors. Indeed, two of the Marin factors, long-term residence and family ties, have been venerable threshold eligibility requirements for discretionary relief from deportation and also positive factors in determining whether an alien merits a favorable exercise of discretion.[17]

---

[17] Regarding long-term residence, there is an unbroken chain of legislation including: an 1888 amendment to the Alien Contract

Particularly since the passage of IIRIRA, repealing former INA § 212(c), and this Court's decision in St. Cyr,[18] cases demonstrate that § 212(c) relief has become the province of extremely long-term lawful permanent residents.[19] These long-term

---

Labor Law, 25 Stat. 566 (1888) (establishing statute of limitations on removal); the 1891 Immigration Act, 26 Stat. 1084 (1891) (same); the Immigration Act of 1917, 39 Stat. 875 (1917), § 3 (Seventh Proviso); former INA § 212(c), 8 U.S.C. § 1182(c); and currently INA § 240A(a)(2), 8 U.S.C. § 1229b(b)(2) (LPR cancellation of removal). Regarding family ties, similarly, legislation includes the 1924 Immigration Act, Pub. L. No. 68-139, 43 Stat. 153, § 14 (1924) (providing for the discretionary suspension of deportation of a minor temporarily admitted to the United States and overstaying a visa if the minor had a U.S. Citizen parent); the 1940 Alien Registration Act, 54 Stat. 670, § 40 (1940) (providing that the Attorney General could suspend a deportation if, *inter alia*, the deportation would "result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien"); Act of July 1, 1948, Pub. L. No. 863, 62 Stat. 1206 (1948) (same); 1952 INA, Pub. L. No. 82–414, 66 Stat. 163 (1952) (establishing five categories of deportable aliens eligible for suspension of deportation and requiring for eligibility that the alien be "a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence"); Act of October 24, 1962, Pub. L. No. 885, 76 Stat. 1247 (1962) (simplifying categories but retaining family hardship requirement); INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (non-LPR cancellation of removal).

[18] 533 U.S. at 326 (preserving § 212(c) eligibility of noncitizens who pled guilty or no contest prior to IIRIRA).

[19] See, e.g., In re De La Cruz, 2010 WL 4509731 (BIA Oct. 29, 2010) (26-year residence); In re Olajope, 2009 WL 4899011 (BIA Nov. 27, 2009) (LPR for 26 years); In re Telleria, 2009 WL 3713330 (BIA Oct. 29, 2009) (LPR for approximately 40 years); In re Pupo, 2009 WL 3713308 (BIA Oct. 28, 2009) (LPR for over 30 years); In re Lobaina-Gil, 2009 WL 3713244 (BIA Oct. 26,

residents raise families in this country, including U.S. citizen children, spouses, and other relatives; own or contribute to businesses; and pay their taxes. In our experience, applicants' criminal convictions are often extremely old[20] and relatively minor.[21]

2009) (LPR for almost 30 years); In re Salinas-Flores, 2008 WL 655909 (BIA Feb. 15, 2008) (35-year residence); In re Bowen, 2007 WL 275726 (BIA Jan. 11, 2007) (LPR for 35 years, or "her entire adult life"); In re Cushicagua-Peralta, 2006 WL 2008289 (BIA May 31, 2006) (respondent came to U.S. at the "young age of 13 and had been a lawful permanent resident in this country for almost 30 years"); In re Raola-Rosaria, 2004 WL 2418656 (BIA Sept. 1, 2004) (respondent entered the U.S at a "young age" and resided in the U.S. for 40 years); In re Mclean, 2004 WL 1739118 (BIA June 17, 2004) (30-year residence).

[20] See, e.g., Francois v. Attorney Gen. of U.S., 264 Fed. App'x 211, 212 (3d Cir. 2008) (upholding pretermission of waiver regarding 23-year-old crimes committed when respondent was 17 years old); Castaneda-Sanchez v. Holder, 396 Fed. App'x 84 (5th Cir. 2010) (upholding pretermission of waiver of 28-year-old conviction); In re Quinones, 2010 WL 3157442 (BIA July 27, 2010) (pretermitting waiver of 20-year- old conviction); Pupo, 2009 WL 3713308 (granting waiver of 20-year-old conviction); Lobaina-Gil, 2009 WL 3713244 (granting waiver of over 20-year-old conviction; respondent had been an LPR for almost 30 years); Bowen, 2007 WL 275726 (granting waiver of 22-year-old conviction when respondent was 21 years old); In re Donaldson, 2005 WL 3802267 (BIA Nov. 28, 2005) (pretermitting waiver of 23-year-old conviction); Raola-Rosaria, 2004 WL 2418656 (granting waiver for respondent who had last been arrested 20 years prior).

[21] See St. Cyr, 533 U.S. at 347 (noting that the changes in the 1996 statutes included "bringing under the definition [of "aggravated felony"] more minor crimes"); United States v. Copeland, 369 F. Supp. 2d 275, 307 (E.D.N.Y. 2005), aff'd, 232 Fed. App'x 72 (2d Cir. 2007) ("'[W]hile it is indeed lengthy, the respondent's criminal record includes several arrests for minor offenses which were committed when the respondent was a minor from an abusive and troubled background.'") (quoting Matter of Dominos Dias Goncalves, No. A34 744 205, 26 Immig.

These long-term LPRs with old criminal convictions have frequently turned their lives around in the interim, rehabilitated themselves, and become important and valuable members of their communities. They are quintessential examples of why the "forgiveness" provision that § 212(c) represents was for so long part of the INA. Retroactively depriving these LPRs of an opportunity to seek discretionary relief – to present a final plea for mercy based on evidence of good conduct – is both unlawful and unconscionable.

As faith-based organizations, we are particularly sensitive to the role of redemption and mercy in our immigration system. Section 212(c) relief is for lawful permanent residents an instantiation of the principle that individualized

---

Rptr. (MB) B1-117 (BIA Nov. 25, 2002)); In re Emordi, 2006 WL 2391253 (BIA June 22, 2006) (granting waiver of 16-year-old expunged conspiracy conviction for which respondent was sentenced to probation only); In re Murray, 2004 WL 2943520 (BIA Oct. 29, 2004) (granting waiver of two convictions of simple possession of marijuana for which respondent was not sentenced to a term of imprisonment); In re Acosta-Campos, 2004 WL 2374871 (BIA Aug. 18, 2004) (granting waiver for 13-year-old conviction, subsequently dismissed, for which respondent was given an "extremely light sentence" of six days in jail with probation); In re Ochoa de Fuentes, 2004 WL 1059687 (BIA Jan. 9, 2004) (granting waiver for 10-year-old conviction; respondent had taken phone messages for her uncle, some of which related to drugs, and the "prosecutor in her case urged the judge to impose a light sentence because of her very minor role" in the conspiracy); In re Marine Nunez, 2003 WL 23270113 (BIA Oct. 28, 2003) (granting waiver for 19-year-old conviction for attempted robbery, in part because sentence of only four months in prison indicates that respondent's role may have been minor).

discretion should be available to pardon those who have transgressed but subsequently learned from and risen above their errant acts. See, e.g., Gallegos-Vasquez v. Holder, 636 F.3d 1181, 1183 (9th Cir. 2011) (Church membership and activities part of Respondent's post-conviction life); Avilez-Granados v. Gonzales, 481 F.3d 869, 871 (5th Cir. 2007) (Respondent "won his victim's forgiveness"); Gonzalez v. INS, 996 F.2d 804, 808 (6th Cir. 1993) (Respondent was "active in her church and performed a great deal of community service"); In re Olajope, 2009 WL 4899011 (BIA Nov. 27, 2009) (Respondent was an "active member of his church community"); In re Acosta-Campos, 2004 WL 2374871 (BIA Aug. 18, 2004) (Respondent was "very involved in the community through his church"). To give but one comprehensive example out of manifold cases, in Matter of Arreguin de Rodriguez, 21 I. & N. Dec. 38 (BIA 1995), the BIA recognized that a waiver under § 212(c) was appropriate for a mother of five U.S. citizen children where, "[d]espite her current incarceration, the record reflects that the applicant has apparently used her time in prison well in that she has advanced her otherwise meager education by voluntarily pursuing GED studies, for which she received a letter of commendation, has pursued other courses, has had no prison infractions, and has been involved in a church ministry." *Id.* at 40. Section 212(c) relief recognized the possibility of rehabilitation and encouraged LPRs to devote themselves to reconstructing their damaged lives by communicating the message that their banishment from family and community in the United States would not be mandatory.

Under the BIA's rule and the Ninth Circuit's reasoning, however, similar "long-time residents with deep roots in American communities" will "face virtually automatic deportation" even though "in many cases [immigration authorities have] only recently taken note of their long past criminal activities." Catney v. INS, 178 F.3d 190, 191 (3d Cir. 1999) (citing Mirta Ojito, *Old Crime Returns to Haunt an Immigrant*, N.Y. TIMES, Oct. 15, 1997, at B1 (describing an alien subject to deportation for a "misdemeanor he committed 23 years ago and for which, until now, he had never spent a day in jail")).[22] For such long-term residents, this means being "picked up off the streets for crimes . . . committed many years ago, torn from his or her family, job or business, and deported." Mojica v. Reno, 970 F. Supp. 130, 137 (E.D.N.Y. 1997), aff'd in part, dismissed in part sub nom. Henderson v. INS, 157 F.3d 106 (2d Cir. 1998). Congress did not intend this result and the hitherto unbroken chain of case precedent created contrary reliance interests for long-time LPRs who were accorded no notice that their opportunity to present a case for mercy would suddenly be short-circuited.

II. THE NINTH CIRCUIT'S HYPOTHESIS IN *ABEBE* IS UNSUPPORTED AND IRRATIONAL.

---

[22] See also U.S. Rep. Zoe Lofgren, A Decade of Radical Change in Immigration Law: An Inside Perspective, 16 STAN. L. & POL'Y REV. 349, 360 (2005) (noting that because of the unavailability of relief under § 212(c) "nuclear families have been separated and adversely affected . . . often by the deportation of a parent of U.S. citizens who committed only one minor crime many years before 1996").

The Ninth Circuit's "self-deportation" rationale for upholding the BIA's rule is unsupported and unsupportable. The hypothesis that Congress sought to encourage LPRs to leave after a conviction flies in the face of actual congressional policy. As noted above, Congress has never suggested that it intended for LPRs, particularly long-term residents with deep family and community ties who would still be eligible for discretionary § 212(c) relief after IIRIRA, to "self-deport." On the contrary, Congress has consistently set up incentives encouraging LPRs to remain in the country.

The Ninth Circuit's rationale suggests that Congress intended long-term LPRs to remove themselves from the country before any allegation or finding as to the immigration effects of their criminal conviction.[23] While Congress has clearly articulated a policy of removing aliens who have been convicted of certain crimes, it has never encouraged LPRs to undermine their ties to this country before they have even been charged with removability, much less subjected to a final order of removal. On the contrary, the purpose of § 212(c)

---

[23] "Self-deportation" is a technical term in immigration law, signifying an alien's departure from the United States while subject to an outstanding valid order of deportation or removal. See INA § 101(g), 8 U.S.C. § 1101(g); Matter of Bulnes-Nolasco, 25 I. & N. Dec. 57 (BIA 2009). But in the scenario suggested by the Ninth Circuit, there is no order of deportation or removal. Before the long-term LPR in question could actually self-deport, the alien would first have to be charged as removable; second, demonstrated and found to be removable; and third, found ineligible for or not to warrant any relief from removal.

was the creation of administrative discretion to forgive deserving LPRs. See, e.g., Nakaranurack, 68 F.3d at 292 ("Nakaranurack admitted his criminal conviction and conceded deportability, but sought discretionary relief under the so-called 'forgiveness' provision of section 212(c) of the [INA], 8 U.S.C. § 1182(c)."); Marti-Xiques v. INS, 713 F.2d 1511 (11th Cir. 1983), modified on other grounds by 741 F.2d 350 (11th Cir. 1984) ("[T]he purpose of the section is to allow forgiveness."); Matter of Granados, 16 I. & N. Dec. 726, 728 (BIA 1979) (noting the "generous spirit" of § 212(c), which it termed a "forgiveness statute"). Particularly since IIRIRA and St. Cyr, in *Amici*'s experience and as reflected in reported and unreported cases, such worthy, rehabilitated, long-term LPRs comprise the lion's share of § 212(c) applicants. For LPRs convicted of a minor crime decades ago to be torn away from their families without even the opportunity to ask for a discretionary exercise of mercy by demonstrating the ways in which their lives have turned around and become enmeshed with their communities is completely contrary to congressional treatment of LPRs and to the long-and-commonly understood purpose of § 212(c) relief.

Take by way of example two hypothetical aliens who have both been LPRs since 1970. In 1984, each was arrested in Florida and pled guilty to one count of dealing in stolen property. The criminal court imposed suspended terms of one year imprisonment. The convictions constitute both an

aggravated felony,[24] rendering each deportable,[25] and a crime involving moral turpitude,[26] rendering each inadmissible.[27] The BIA would permit LPR 1 to apply for § 212(c) relief if LPR 1 is ever placed in removal proceedings and has returned to the United States after traveling abroad. But the BIA would not permit LPR 2 to apply for § 212(c) relief absent a trip abroad, regardless of identical compelling factors demonstrating redemption.

Yet LPR 2 would have had no notice of the BIA's changed rule regarding § 212(c) relief, and would have been unable to plan accordingly despite putting forth strong efforts to rehabilitate. Instead, he or she would have focused on Congress's long-standing encouragement of LPRs to remain in the United States and relied upon decades of statutory enactments supporting this policy, as well as clear case law allowing § 212(c) applications by those in LPR 2's circumstances. The distinction newly drawn by the BIA between LPRs 1 and 2 is an artificial one that sorts deportable LPRs in a manner that Congress never intended, one that is starkly inconsistent with § 212(c)'s history and how LPRs have been consistently treated for decades. Contrary to the Ninth Circuit majority's portrayal in Abebe, these are exactly the parallel situations addressed by the BIA's new rule. The rule is an irrational and invidious distinction that must not stand.

---

[24] INA § 101(a)(43)(R), 8 U.S.C. § 1101(a)(43)(R); Matter of Cardiel-Guerrero, 25 I. & N. Dec. 12 (BIA 2009); In re Uribe-Rocha, 2010 WL 4500864, *4 (BIA Oct. 28, 2010).
[25] INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).
[26] Matter of G-----, 2 I. & N. Dec. 235 (BIA 1945).
[27] INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i).

In sum, the Ninth Circuit's rationale for the BIA's new rule has no basis in congressional intent. It will accomplish nothing except for increased detention and hardship for LPRs who deserve an opportunity to present a case for discretionary mercy before they are removed from all the ties they have built in the United States. Such harsh consequences run squarely counter to a consistent array of legislation aimed at keeping LPRs in the United States with the understanding that § 212(c) functioned as a safety valve for all deserving long-term LPRs who have remedied their failings and should remain part of our society.

CONCLUSION

The BIA's new rule resurrects irrational discrimination against LPRs who remain in the United States without having traveled abroad, who are treated less favorably than other LPRs present in the United States who happen to have traveled and returned. In so doing, it directly contravenes Congress's clearly expressed and consistent intent to encourage LPRs to remain physically within the United States, as well as the historical role of § 212(c) relief as a measure of discretionary mercy to encourage and recognize redemption after a fall. The Ninth Circuit's decision must therefore be reversed.

Respectfully submitted.

IRA J. KURZBAN
Counsel of Record
Kurzban, Kurzban, Weinger, Tetzeli & Pratt P.A.
2650 S.W. 27th Avenue, 2nd Floor
Miami, Florida 33133
Tel. (305) 444-0060
Fax. (305) 444-3503
ira@kkwtlaw.com

JULY 12, 2011

AMICUS CURIAE BRIEF

RECORDS AND BRIEFS

JUL 12 2011

No. 10-694

In the Supreme Court of the United States

JOEL JUDULANG, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR FORMER IMMIGRATION OFFICIALS AS AMICI CURIAE SUPPORTING PETITIONER

KANNON K. SHANMUGAM
Counsel of Record
ANA C. REYES
BURDEN H. WALKER*
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

Library of Congress
Law Library

* Admitted in South Carolina and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Bar Rule 49(c)(8).

TABLE OF CONTENTS

Page

Interest of amicus curiae 1

Summary of argument 3

Argument 4

The BIA's decision in *Blake* dramatically altered the availability of discretionary relief for long-time permanent residents subject to deportation 4

A. For nearly 65 years before the BIA's decision in *Blake*, the government granted discretionary relief in deportation proceedings for a wide variety of convictions and without a close comparison of the grounds for deportation and exclusion 4

B. In *Blake*, the BIA applied a new and considerably more stringent test for determining when an alien is entitled to discretionary relief in deportation proceedings 21

Conclusion 24

TABLE OF AUTHORITIES

Cases:

A-, In re, 5 I. & N. Dec. 546 (B.I.A. 1953) 7

A-, In re, 7 I. & N. Dec. 128 (B.I.A. 1956) 8

Abebe v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009) 10

Anwo, In re, 16 I. & N. Dec. 293 (B.I.A. 1977) 13

Anwo v. *INS*, 607 F.2d 435 (D.C. Cir. 1979) 9

Arias-Uribe, In re, 13 I. & N. Dec. 696 (B.I.A. 1971) 9

B-, In re, 1 I. & N. Dec. 204 (B.I.A. 1942) 5

Baig, In re, No. A020-636-907, 4 Immig. Rptr. B1-57 (B.I.A. Jan. 6, 1987) 13

Banuelos-Delena, In re, No. A092-789-794, 2006 WL 901335 (B.I.A. Mar. 2, 2006) 23

Bedoya-Valencia v. *INS*, 6 F.3d 891 (2d Cir. 1993) 11

Blake, In re, 23 I. & N. Dec. 722 (B.I.A. 2005) ..... *passim*

Page

Cases—continued:

Brienza-Schettino, In re, No. A037-194-060,
2005 Immig. Rptr. LEXIS 21294
(B.I.A. Mar. 14, 2005) 19
Brieva-Perez, In re, 23 I. & N. Dec. 766 (B.I.A. 2005) 21
Buscemi, In re, 19 I. & N. Dec. 628 (B.I.A. 1988) 13
Cammack, In re, No. A030-756-066,
26 Immig. Rptr. B1-25 (B.I.A. July 9, 2002) 20
Cardona, In re, No. A040-065-318,
2005 WL 3709244 (B.I.A. Dec. 27, 2005) 22
Caro-Lozano, In re, No. A090-870-395,
2004 WL 1398661 (B.I.A. Apr. 22, 2004) 20
Carrasco, In re, 16 I. & N. Dec. 195 (B.I.A. 1977) 13
Carrasco-Favela v. *INS*,
563 F.2d 1220 (5th Cir. 1977) 10
Chiravacharadhikul v. *INS*,
645 F.2d 248 (4th Cir. 1981) 10
Chow, In re, 20 I. & N. Dec. 647 (B.I.A. 1993) 12, 18
D-, In re, 20 I. & N. Dec. 827 (B.I.A. 1994) 17
D-, In re, 20 I. & N. Dec. 915 (B.I.A. 1994) 17
Das Nevas Cale, In re, No. A013-167-371,
24 Immig. Rptr. B1-264 (B.I.A. Feb. 8, 2002) 20
Davis, In re, 22 I. & N. Dec. 1411 (B.I.A. 2000) 18
De la Rosa v. *Attorney General*,
579 F.3d 1327 (11th Cir. 2009),
cert. denied, 130 S. Ct. 3272 (2010) 22
Diaz-Chambrot, In re,
19 I. & N. Dec. 674 (B.I.A. 1988) 13
Duran, In re, 20 I. & N. Dec. 1 (B.I.A. 1989) 11
Edwards, In re, 10 I. & N. Dec. 506 (B.I.A. 1963) 8
Esposito, In re, 21 I. & N. Dec. 1 (B.I.A. 1995) 12
F-, In re, 6 I. & N. Dec. 537 (B.I.A. 1954) 8
Farinas, In re, 12 I. & N. Dec. 467 (B.I.A. 1967) 8
Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976) 9, 10, 11, 13
G-A-, In re, 7 I. & N. Dec. 274 (B.I.A. 1956) 8
Gabryelsky, In re, 20 I. & N. Dec. 750 (B.I.A. 1993) 12

Page

Cases—continued:

Garbiras-Gandica, In re, No. A036-438-625, 12 Immig. Rptr. B1-141 (B.I.A. Nov. 5, 1993) 18
Garza, In re, No. A090-967-482, 2004 WL 2374468 (B.I.A. July 20, 2004) 20
Gomez-Giraldo, In re, 20 I. & N. Dec. 957 (B.I.A. 1995) 18
Gomez-Perez, In re, No. A037-447-529, 2006 WL 901334 (B.I.A. Mar. 1, 2006) 23
Gordon, In re, 20 I. & N. Dec. 52 (B.I.A. 1989) 13
Granados, In re, 16 I. & N. Dec. 726 (B.I.A. 1979) 12
Guzman, In re, No. A040-522-914, 2005 Immig. Rptr. LEXIS 9375 (B.I.A. Jan. 19, 2005) 20
H-R-, In re, 4 I. & N. Dec. 742 (B.I.A. 1952) 8
Hernandez-Casillas, In re, 20 I. & N. Dec. 262 (Att'y Gen. 1991), aff'd, 983 F.2d 231 (5th Cir. 1993) 11
Hussein, In re, No. A026-416-298, 2004 WL 1059601 (B.I.A. Mar. 15, 2004) 19, 20, 21
INS v. *St. Cyr*, 533 U.S. 289 (2001) 19
Je Young Joung, In re, No. A035-003-510, 2004 WL 2375124 (B.I.A. Sept. 28, 2004) 20
Jimenez-Santillano, In re, 21 I. & N. Dec. 567 (B.I.A. 1996) 11
K-, In re, 9 I. & N. Dec. 585 (B.I.A. 1962) 8
K-, In re, 20 I. & N. Dec. 418 (B.I.A. 1991) 17
K-L-, In re, 20 I. & N. Dec. 654 (B.I.A. 1993) 12, 18
Katsis v. *INS*, 997 F.2d 1067 (3d Cir. 1993) 10
Khalik, In re, 17 I. & N. Dec. 518 (B.I.A. 1980) 13
Kim, In re, 17 I. & N. Dec. 144 (B.I.A. 1979) 13
L-, In re, 1 I. & N. Dec. 1 (Att'y Gen. 1940) 5, 6, 23
L-, In re, 3 I. & N. Dec. 767 (B.I.A. 1949) 7
Leyva, In re, 16 I. & N. Dec. 118 (B.I.A. 1977) 13
Llerenas-Ceballos, In re, No. A034-011-098, 14 Immig. Rptr. B1-87 (B.I.A. Apr. 18, 1995) 18
Lok, In re, 15 I. & N. Dec. 720 (B.I.A. 1976) 13

Page

Cases—continued:

Loney, In re, No. A035-770-136,
2004 WL 1167256 (B.I.A. Feb. 10, 2004) 20
Lopez-Jimenez, In re, No. A036-410-813,
25 Immig. Rptr. B1-125 (B.I.A. Mar. 24, 2002) 20
Loza-Bedoya, In re, 10 I. & N. Dec. 778 (B.I.A. 1964) 8
Lozada v. *INS*, 857 F.2d 10 (1st Cir. 1988) 10
Lozada-Duenas, In re, No. A034-622-043,
8 Immig. Rptr. B1-99 (B.I.A. Aug. 29, 1990) 13
M-, In re, 5 I. & N. Dec. 598 (B.I.A. 1954) 8
Mendez, In re, No. A030-730-909,
3 Immig. Rptr. B1-129 (B.I.A. Feb. 13, 1986) 13
Meza, In re, 20 I. & N. Dec. 257 (B.I.A. 1991) 16, 18
Mezrioui v. *INS*,
154 F. Supp. 2d 274 (D. Conn. 2001) 18, 19
Miller, In re, No. A030-343-525,
2004 WL 848531 (B.I.A. Mar. 1, 2004) 20
Montenegro, In re, 20 I. & N. Dec. 603 (B.I.A. 1992) 12
Monterrosa-Maitland, In re, No. A014-818-584,
12 Immig. Rptr. B1-57 (B.I.A. Aug. 3, 1993) 17
Moreno-Guerrero, In re, No. A036-607-145,
2007 Immig. Rptr. LEXIS 10763
(B.I.A. May 21, 2007) 12
Munoz, In re, No. A035-279-774,
28 Immig. Rptr. B1-1 (B.I.A. Aug. 7, 2003) 19, 20
Newton, In re, 17 I. & N. Dec. 133 (B.I.A. 1979) 13
Nunez-Soto, In re, No. A091-330-661,
2004 WL 1398703 (B.I.A. Apr. 15, 2004) 20
Ogunde, In re, No. A028-398-927,
2003 WL 23521885 (B.I.A. Nov. 10, 2003) 20
Ortiz-Campas, In re, No. A036-913-872,
2004 WL 2375114 (B.I.A. Sept. 23, 2004) 19
Pacheco, In re, No. A012-007-546,
25 Immig. Rptr. B1-46 (B.I.A. Mar. 29, 2003) 20
Paredes-Osuna, In re, No. A038-975-297,
2006 Immig. Rptr. LEXIS 12680
(B.I.A. Aug. 1, 2006) 22

Page

Cases—continued:

Pascua v. *Holder*, 641 F.3d 316 (9th Cir. 2011) 10
Patarroyo-Sanchez, In re, No. A042-279-463,
2004 WL 1739093 (B.I.A. June 18, 2004) 19
Phom, In re, No. A027-394-995,
2004 WL 2952183 (B.I.A. Nov. 4, 2004) 19
Ramirez-Somera, In re,
20 I. & N. Dec. 564 (B.I.A. 1992) 17
Rangel-Zuazo, In re, No. A090-640-428
(B.I.A. May 25, 2005) 23
Ranglin, In re, No. A041-458-034,
2005 Immig. Rptr. LEXIS 20724
(B.I.A. Mar. 15, 2005) 19
Reyes, In re, 20 I. & N. Dec. 789 (B.I.A. 1994) 17
Reyes Manzueta, In re, No. A093-022-672,
2003 WL 23269892 (B.I.A. Dec. 1, 2003) 19, 20, 22
Reyes-Hernandez, In re, No. A037-202-672,
2004 WL 1059596 (B.I.A. Mar. 15, 2004) 20
Rivera-Rioseco, In re,
19 I. & N. Dec. 833 (B.I.A. 1988) 13
Roberts, In re, 20 I. & N. Dec. 294 (B.I.A. 1991) 16, 17
Rodriguez-Cortes, In re,
20 I. & N. Dec. 587 (B.I.A. 1992) 17
Rodriguez-Reyes v. *INS*, No. 92-3305,
1993 WL 8150 (6th Cir. Jan. 15, 1993) 10
Rodriguez-Vera, In re, 17 I. & N. Dec. 105 (1979) 13, 14
Rowe, In re, No. A037-749-964 (B.I.A. May 9, 2003) 20
S-, In re, 6 I. & N. Dec. 392 (B.I.A. 1954) 7, 8
S-Lei, In re, No. A038-139-424 (B.I.A. May 27, 2004) 20
S-R-, In re, 6 I. & N. Dec. 405 (B.I.A. 1954) 9
Salmon, In re, 16 I. & N. Dec. 734 (B.I.A. 1978) 11, 13
Sanchez, In re, 17 I. & N. Dec. 218 (B.I.A. 1980) 13
Segoviano-Mendoza, In re, No. A091-577-720,
2004 WL 2374479 (B.I.A. July 27, 2004) 20
Silva, In re, 16 I. & N. Dec. 26 (B.I.A. 1976) 9
Silva-Rodriguez, In re,
20 I. & N. Dec. 448 (B.I.A. 1992) 17

Page

Cases—continued:

T-, In re, 5 I. & N. Dec. 389 (B.I.A. 1953) 9, 12
T-, In re, 6 I. & N. Dec. 410 (B.I.A. 1954) 8
Tanori, In re, 15 I. & N. Dec. 566 (B.I.A. 1976) 8
Tapia-Acuna v. *INS*, 449 U.S. 945 (1980) 10
Tapia-Acuna v. *INS*, 640 F.2d 223 (9th Cir. 1981) 10
Truong, In re, 22 I. & N. Dec. 1090 (B.I.A. 1999) 18
Umer, In re, No. A038-802-967,
2010 WL 1606998 (B.I.A. Mar. 31, 2010) 22
V-, In re, 2 I. & N. Dec. 340 (B.I.A. 1945) 7, 8
Valadez-Estrada, In re, No. A036-046-377,
2005 Immig. Rptr. LEXIS 18520
(B.I.A. Mar. 15, 2005) 12
Valdez, In re, No. A041-299-144,
2005 Immig. Rptr. LEXIS 8076
(B.I.A. Mar. 2, 2005) 20
Varela-Blanco v. *INS*, 18 F.3d 584 (8th Cir. 1994) 10
Variamparambil v. *INS*,
831 F.2d 1362 (7th Cir. 1987) 10
Vissian v. *INS*, 548 F.2d 325 (10th Cir. 1977) 10
Vongvixay, In re, No. A023-882-967,
2003 WL 23216741 (B.I.A. Sept. 29, 2003) 20
Wadud, In re, 19 I. & N. Dec. 182 (B.I.A. 1984) 11
Yeung v. *INS*, 76 F.3d 337 (11th Cir. 1996) 10

Statutes and rule:

8 U.S.C. 1182(c) (1994) (repealed 1996) ..... *passim*
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690,
§ 7344, 102 Stat. 4470-4471 15
Illegal Immigration Reform and Immigrant
Responsibility Act of 1996, Pub. L. No. 104-208,
§ 304(b), 110 Stat. 3009-597 18
Immigration Act of 1917, Pub. L. No. 64-301,
§ 3, 39 Stat. 874 4
Immigration Act of 1990, Pub. L. No. 101-649,
104 Stat. 4978:
§ 501, 104 Stat. 5048 15

Page

Statute and rule—continued:

§ 511, 104 Stat. 5052 15
Sup. Ct. R. 37.6 1

Miscellaneous:

Lory D. Rosenberg & Denyse Sabagh, *A Practitioner's Guide to INA § 212(c)*, 93-04 Immigr. Briefings 1 (1993) 5
Gerald Seipp, *Criminal and Related Grounds of Inadmissibility and Deportability—Similarities, Differences, and Anomalies with an Attitude*, 08-03 Immigr. Briefings 1 (2008) 22
U.S. Dep't of Justice, *Immigration Judge Benchbook* (1st ed. 1986) 14
U.S. Dep't of Justice, *Immigration Judge Benchbook* (2d ed. 1988) 14, 15
U.S. Dep't of Justice, INS, Office of General Counsel, *Availability of 212(c) Relief for LPRs Who Are Excludable Under 212(a)(6)(E)(i)*, Genco Op. No. 93-23 (INS), available at 1993 WL 1503970 (Mar. 16, 1993) 16

In the Supreme Court of the United States

No. 10-694

JOEL JUDULANG, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR FORMER IMMIGRATION OFFICIALS AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF AMICI CURIAE

Amici are former officials from the Immigration and Naturalization Service (INS), U.S. Immigration and Customs Enforcement (ICE), and the Department of Justice (DOJ) who had responsibility for the interpretation and enforcement of the Nation's immigration laws before the BIA's recent decision in *In re Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005).[1]

[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission;

As former INS, ICE, and DOJ officials, amici made daily decisions concerning the initiation and conduct of proceedings to exclude or deport aliens. Amici continue to practice in the immigration field and are therefore familiar with the aftermath of the BIA's decision in *Blake*.

Amicus Paul W. Virtue served as general counsel of the INS from 1998 to 1999; as acting executive associate commissioner for programs from 1997 to 1998; and as deputy general counsel from 1988 to 1997. As general counsel, he was responsible for overseeing the INS's legal proceedings more generally and for supervising the hundreds of INS attorneys who represented the government in exclusion and deportation proceedings in the immigration courts. In addition, he was responsible for advising the Attorney General, the Commissioner of the INS, and others on all aspects of immigration policy. Notably, as deputy general counsel, he developed government policy, and wrote an important opinion, on the issue of eligibility for discretionary relief in deportation proceedings. He is currently a partner in the Washington office of the law firm of Baker & McKenzie LLP.

Amicus Bo Cooper served as general counsel of the INS from 1999 to 2003. In that capacity, like Mr. Virtue, he was responsible for overseeing the INS's legal proceedings and for advising other government officials on all aspects of immigration policy. He is currently a partner in the Washington office of the law firm of Berry Appleman & Leiden LLP.

---

and no person other than amici or their counsel made such a monetary contribution. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

The remaining amici served as trial attorneys with the INS, ICE, or DOJ, and in those capacities represented the government with respect to applications for discretionary relief of the type at issue here. Those amici are Stephen Klapisch (1980-1987); Kerry Bretz (1991-1994); Elizabeth J. Dobosiewicz (1993-1999); Rolando R. Velasquez (1994-2001); Kurt R. Saccone (1994-1999); Thomas Ragland (1995-2004); Stan Weber (1996-2009); Parisa Karaahmet (1996-2000); Daniel Brown (1996-1999); Chartrisse A. Adlam (1997-2008); Kyle D. Brown (1998-2001); and Ricardo Vega (2002-2010). All of those amici continue to work in the immigration field as private practitioners.

Amici strongly support the enforcement of the Nation's immigration laws and worked diligently throughout their government service to improve the government's practices regarding the exclusion and deportation of aliens. Amici file this brief to provide the Court with additional insights, based on their own experience, concerning the availability of discretionary relief in deportation proceedings before the BIA's decision in *Blake*.

SUMMARY OF ARGUMENT

Until the BIA's recent decision in *Blake*, aliens in deportation proceedings whose criminal convictions predated the repeal of former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), were generally thought to be eligible to apply for discretionary relief, subject only to a narrow set of exceptions. Of course, the mere availability of discretionary relief did not mean that such relief was routinely granted. Instead, the determination of whether an alien should be granted discretionary relief was typically based on the merits of the application, taking into account such factors as the alien's ties to the

country and efforts at rehabilitation, rather than the technicalities of the alien's criminal record. In *Blake*, however, the BIA suddenly changed course, taking the position that aliens in deportation proceedings could be eligible for discretionary relief under Section 212(c) only if the statutory basis for deportation closely corresponds linguistically with a statutory basis for exclusion. As amici will explain in this brief, *Blake* represents a dramatic departure from the well-settled and longstanding approach to discretionary relief.

ARGUMENT

THE BIA'S DECISION IN *BLAKE* DRAMATICALLY ALTERED THE AVAILABILITY OF DISCRETIONARY RELIEF FOR LONG-TIME PERMANENT RESIDENTS SUBJECT TO DEPORTATION

A. For Nearly 65 Years Before The BIA's Decision In *Blake*, The Government Granted Discretionary Relief In Deportation Proceedings For A Wide Variety Of Convictions And Without A Close Comparison Of The Grounds For Deportation And Exclusion

1. As is relevant here, the concept of "discretionary relief" in deportation proceedings originates from a predecessor statute to Section 212(c)—the so-called "Seventh Proviso" to Section 3 of the Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 878 (8 U.S.C. 136(p) (1946)) (repealed 1952). That statute provided that "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe." *Ibid.* Although the statute by its terms seemingly applied only to aliens seeking "admi[ssion]" to the United States upon "returning after a temporary absence," immigration officials soon construed it to apply to

aliens who were not then in proceedings concerning their admissibility (*i.e.*, exclusion proceedings).

Immigration officials first permitted certain aliens who had never left the United States to apply for advance permission to depart the country voluntarily and "thence to make immediate application for readmission." *In re L-*, 1 I. & N. Dec. 1, 5 (Att'y Gen. 1940); see *In re B-*, 1 I. & N. Dec. 204, 207 (B.I.A. 1942). In essence, that mechanism permitted the "[a]dvance exercise" of the power to grant discretionary relief—and thereby "enabled an applicant to obtain in one proceeding" both "permission to depart the U.S. voluntarily" and "a waiver of the ground of exclusion arising upon subsequent application for admission to the U.S." Lory D. Rosenberg & Denyse Sabagh, *A Practitioner's Guide to INA § 212(c)*, 93-04 Immigr. Briefings 1 (1993) (noting that the "advance exercise" procedure dates from 1935). As a result, discretionary relief was effectively available to any alien, whether excludable or deportable, who could satisfy the requirement of at least seven years of continuous domicile in the United States, even if the alien had not previously left the country for a "temporary absence."

Immigration officials later extended the availability of "discretionary relief" under the Seventh Proviso to certain aliens in deportation proceedings. In 1940, the BIA took up the question of whether an alien in deportation proceedings could seek discretionary relief under the Seventh Proviso, even though the alien had previously been readmitted to the country after a "temporary absence." See *L-*, 1 I. & N. Dec. at 2-3. The alien in question had been convicted of larceny in 1924, left the United States for two months in 1939, and been readmitted without showing his record of conviction. See *id.* at 4. Immigration officials initiated deportation proceedings

on the ground that the alien had reentered the country despite a conviction for a "crime involving moral turpitude" (which could also have served as a basis for exclusion). See *ibid.*

The BIA referred the matter to the Attorney General, and then-Attorney General Robert Jackson determined that discretionary relief should be available to such an alien in deportation proceedings—even though the statute by its terms seemingly afforded discretionary relief only in *exclusion* proceedings. See *L-*, 1 I. & N. Dec. at 5. The Attorney General reasoned that, because the "advance exercise" of the power to grant discretionary relief was a "long-established and useful practice" of the INS, the "later, corrective exercise of the authority" was also proper, since it "amounts to little more than a correction of [the] record of entry." *Id.* at 6. The Attorney General added that it would be "capricious and whimsical" to leave an alien in deportation proceedings worse off than an alien in exclusion proceedings; whether an alien receives a "fresh judgment" on eligibility to live in the United States, he concluded, "ought not to depend upon the technical form of the proceedings." *Id.* at 5.

In so determining, the Attorney General recognized that granting such a waiver on a *nunc pro tunc* basis—*i.e.*, as if the request for a waiver had been made in the course of earlier *exclusion* proceedings—would have the effect of barring the alien's *deportation*, even though the earlier conviction rendered the alien deportable "under the literal terms" of the 1917 Immigration Act. *L-*, 1 I. & N. Dec. at 6. The Attorney General reasoned that the deportation and exclusion provisions should be "read together," with the Seventh Proviso making discretionary relief available in deportation proceedings just as it would have been in any earlier exclusion proceedings. *Ibid.* Subsequent BIA decisions confirmed the availabili-

ty of *nunc pro tunc* discretionary relief in deportation proceedings. See, *e.g.*, *In re L-*, 3 I. & N. Dec. 767, 768 (B.I.A. 1949); *In re V-*, 2 I. & N. Dec. 340, 345 (B.I.A. 1945).

2. In 1952, Congress enacted the INA, which comprehensively overhauled the Nation's immigration laws. In codifying the Seventh Proviso as Section 212(c) of the INA, however, Congress left its language virtually untouched. Section 212(c) provided that "[a]liens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to" various provisions setting out grounds for exclusion. 8 U.S.C. 1182(c) (1994) (repealed 1996). Although the BIA had consistently interpreted the Seventh Proviso to make discretionary relief available on a *nunc pro tunc* basis to aliens in deportation proceedings, and although that practice was "well known" to Congress at the time, *In re S-*, 6 I. & N. Dec. 392, 394 (B.I.A. 1954), Congress made no effort in the INA to abrogate that practice and limit the availability of discretionary relief to aliens in exclusion proceedings.

In litigating and deciding cases during this period concerning the availability of discretionary relief for aliens in deportation proceedings, immigration officials were primarily concerned with factors such as whether the alien had been appropriately admitted for permanent residence and had spent the requisite time in the United States, see, *e.g.*, *S-*, 6 I. & N. Dec. at 393-394, and whether the equities counseled for or against the exercise of discretion, see, *e.g.*, *In re A-*, 5 I. & N. Dec. 546, 550-551 (B.I.A. 1953). Considering those factors, immigration officials regularly awarded relief on a *nunc pro tunc* ba-

sis to aliens in deportation proceedings. See, *e.g.*, *In re Farinas*, 12 I. & N. Dec. 467, 474 (B.I.A. 1967); *In re Edwards*, 10 I. & N. Dec. 506, 511 (B.I.A. 1963); *In re K-*, 9 I. & N. Dec. 585, 586 (B.I.A. 1962); *In re G-A-*, 7 I. & N. Dec. 274, 275-276 (B.I.A. 1956); *In re F-*, 6 I. & N. Dec. 537, 537-538 (B.I.A. 1954); *In re T-*, 6 I. & N. Dec. 410, 414 (B.I.A. 1954); *S-*, 6 I. & N. Dec. at 397; *In re M-*, 5 I. & N. Dec. 598, 600 (B.I.A. 1954); p. 7, *supra* (citing cases awarding relief under the Seventh Proviso). Immigration officials also took an expansive view of what constituted *nunc pro tunc* relief, awarding relief in one case to an alien who had briefly departed the country nearly twenty years earlier. See *M-*, 5 I. & N. Dec. at 600.

Notably, during this period, the BIA granted discretionary relief on a *nunc pro tunc* basis to aliens with numerous types of convictions which, if discovered at the border, would have rendered them excludable. Accordingly, immigration officials determined that aliens who had been convicted of a wide range of offenses were eligible for relief. See, *e.g.*, *In re Tanori*, 15 I. & N. Dec. 566, 567-568 (B.I.A. 1976) (drug possession); *Farinas*, 12 I. & N. Dec. at 473-474 (burglary); *K-*, 9 I. & N. Dec. at 586 (breaking and entering); *In re A-*, 7 I. & N. Dec. 128, 132 (B.I.A. 1956) (counterfeiting); *F-*, 6 I. & N. Dec. at 537 (petit larceny); *T-*, 6 I. & N. Dec. at 413-414 (perjury); *V-*, 2 I. & N. Dec. at 345 (petty theft). The BIA suggested that aliens convicted of violent offenses such as murder could also be eligible. See *In re H-R-*, 4 I. & N. Dec. 742, 744 (B.I.A. 1952). To the extent that the BIA excluded certain aliens as ineligible, that category largely consisted of aliens who had unlawfully entered the country. See, *e.g.*, *In re Loza-Bedoya*, 10 I. & N.

Dec. 778, 779-780 (B.I.A. 1964); *In re T-*, 5 I. & N. Dec. 389, 390 (B.I.A. 1953).[2]

3. Prior to 1976, although the BIA made discretionary relief available to aliens in deportation proceedings, it limited the class of eligible aliens to those who had temporarily left the country after the conviction for which deportation was being sought. See, *e.g.*, *In re Arias-Uribe*, 13 I. & N. Dec. 696, 698 (B.I.A. 1971). In 1976, however, the Second Circuit held that it was irrational to treat aliens who had temporarily left the country differently from aliens who had not. See *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976). The court reasoned that "an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time." *Ibid.*

Immigration officials quickly adopted the rule of *Francis* nationwide and made discretionary relief available not just on a *nunc pro tunc* basis to aliens who had temporarily left the country, but also to aliens who had not. See, *e.g.*, *In re Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976).[3] Other circuits likewise followed the Second Circuit's lead and held that discretionary relief was available to both classes of aliens. See *Anwo* v. *INS*, 607 F.2d

---

[2] In one case, the BIA denied eligibility to an alien who had been convicted of certain drug offenses partly because, at the time the alien applied for relief, the offenses in question did not constitute a basis for exclusion. See *In re S-R-*, 6 I. & N. Dec. 405, 408-409 (B.I.A. 1954).

[3] In *Silva*, the BIA suggested that, in cases in which the alien had not temporarily left the country, discretionary relief could be viewed as the equivalent of an advance waiver of inadmissibility, which immigration officials had long granted. See 16 I. & N. Dec. at 27.

435, 436 n.3 (D.C. Cir. 1979) (per curiam); *Lozada* v. *INS*, 857 F.2d 10, 11 n.1 (1st Cir. 1988); *Katsis* v. *INS*, 997 F.2d 1067, 1070 (3d Cir. 1993); *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 248 n.1 (4th Cir. 1981); *Carrasco-Favela* v. *INS*, 563 F.2d 1220, 1221 n.3 (5th Cir. 1977) (per curiam); *Rodriguez-Reyes* v. *INS*, No. 92-3305, 1993 WL 8150, at *2 (6th Cir. Jan. 15, 1993); *Variamparambil* v. *INS*, 831 F.2d 1362, 1364 n.1 (7th Cir. 1987); *Varela-Blanco* v. *INS*, 18 F.3d 584, 586 (8th Cir. 1994) (per curiam); *Vissian* v. *INS*, 548 F.2d 325, 328 nn.2-3 (10th Cir. 1977); *Yeung* v. *INS*, 76 F.3d 337, 340 n.4 (11th Cir. 1996). Although the Ninth Circuit had previously held that discretionary relief was unavailable to an alien who had not temporarily left the country after being convicted of a drug-related offense, it reversed course after the Solicitor General informed this Court that such a rule did "not reflect the government's current position" and that "it is sufficient for the proper administration of the Nation's immigration program that the fact and nature of a drug conviction be taken into account in the discretionary aspect of the determination whether Section [212(c)] relief should be granted." Cert. Resp. Br. at 6, *Tapia-Acuna* v. *INS*, 449 U.S. 945 (1980) (No. 80-74); see *Tapia-Acuna* v. *INS*, 640 F.2d 223, 225 (9th Cir. 1981).[4]

Although *Francis* extended the category of deportable aliens who could seek discretionary relief, immigration officials did not understand it to mandate a close

---

[4] More recently, in *Abebe* v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc), the Ninth Circuit cast doubt on the availability of discretionary relief under Section 212(c) for aliens in deportation proceedings. Subsequently, however, the Ninth Circuit assured that, notwithstanding its decision in *Abebe*, discretionary relief "remains available as a remedy from deportation." *Pascua* v. *Holder*, 641 F.3d 316, 319 n.2 (9th Cir. 2011).

comparison of the statutory bases for deportation and exclusion as a prerequisite for discretionary relief. To the contrary, the BIA noted that, although "the language [in the comparable exclusion provision] is not exactly the same as the language [in the applicable deportation provision], * * * drawing such a distinction would run counter to the rationale of *Francis*." *In re Salmon*, 16 I. & N. Dec. 734, 736 (B.I.A. 1978).

Consistent with that understanding, immigration officials continued to take the position that aliens in deportation proceedings were generally eligible for discretionary relief, with two notable exceptions: (1) cases involving immigration violations and (2) cases involving convictions for firearms offenses. See *Bedoya-Valencia* v. *INS*, 6 F.3d 891, 897 (2d Cir. 1993). Those categories of cases were distinct because individuals in those two categories would not have been excludable.

As noted above, the first exception—for cases involving immigration violations—predated the Second Circuit's decision in *Francis*. See pp. 8-9, *supra*. Aliens who had unlawfully entered the country had long been understood to be ineligible for discretionary relief, and immigration officials adhered to that understanding in the wake of *Francis*. See, *e.g.*, *In re Jimenez-Santillano*, 21 I. & N. Dec. 567, 572 (B.I.A. 1996) (fraud and misuse of visas); *In re Hernandez-Casillas*, 20 I. & N. Dec. 262, 281, 286-287 (Att'y Gen. 1991) (entering without inspection), aff'd, 983 F.2d 231 (5th Cir. 1993); *In re Duran*, 20 I. & N. Dec. 1, 4 (B.I.A. 1989) (entering without inspection); *In re Wadud*, 19 I. & N. Dec. 182, 183, 185 (B.I.A. 1984) (aiding and abetting the fraudulent procurement of a visa). Those aliens, however, typically possessed an alternative remedy: an alien who otherwise met the requirements for discretionary relief but had unlawfully entered could simply obtain leave voluntarily

to depart the country and then reenter (because prior entry without inspection would not constitute a ground for exclusion of a permanent resident). See *T-*, 5 I. & N. Dec. at 413.

The second exception—for cases involving convictions for firearm offenses—was initially recognized in *In re Granados*, 16 I. & N. Dec. 726 (B.I.A. 1979). The BIA based that exception on the principle that an alien in deportation proceedings is eligible for discretionary relief under Section 212(c) only when the "ground of deportation is also a ground of inadmissibility." *Id.* at 728. Because the offense of conviction for which deportation was being sought—possession of a concealed sawed-off shotgun—did not constitute a statutory ground for exclusion, the BIA concluded that the alien was ineligible for discretionary relief. *Ibid.* The BIA repeatedly applied that exception in subsequent cases. See, *e.g.*, *In re Esposito*, 21 I. & N. Dec. 1, 10 (B.I.A. 1995); *In re K-L-*, 20 I. & N. Dec. 654, 659 (B.I.A. 1993); *In re Chow*, 20 I. & N. Dec. 647, 651 (B.I.A. 1993); *In re Montenegro*, 20 I. & N. Dec. 603, 605 (B.I.A. 1992). As with aliens who had committed immigration violations, however, aliens who had committed firearms offenses typically had other avenues for relief: an alien with a prior firearms offense could also obtain leave voluntarily to depart the country and then reenter (because a prior firearms offense would not constitute a ground for exclusion), see, *e.g.*, *In re Moreno-Guerrero*, No. A036-607-145, 2007 Immig. Rptr. LEXIS 10763, at *4-*5 (B.I.A. May 21, 2007), or could couple a request for discretionary relief with an application for adjustment of status, see, *e.g.*, *In re Gabryelsky*, 20 I. & N. Dec. 750, 752-756 (B.I.A. 1993); *In re Valadez-Estrada*, No. A036-046-377, 2005 Immig. Rptr. LEXIS 18520, at *2-*3 (B.I.A. Mar. 15, 2005). Accordingly, the practical significance of the two exceptions to the availa-

bility of discretionary relief in deportation proceedings was relatively slight.

Aside from the newly recognized exception for firearms offenses, immigration officials continued to take largely the same approach in considering whether to grant discretionary relief to aliens in deportation proceedings after *Francis*. Immigration officials continued to focus on factors such as whether the alien had been appropriately admitted for permanent residence and had spent the requisite time in the United States and whether the equities counseled for or against the exercise of discretion.[5] Immigration officials also continued to take the view that aliens who had been convicted of a wide range of offenses, including violent offenses, were eligible for discretionary relief.[6] And where relief was denied, it was usually on the merits, based on a weighing of the equities.[7]

---

[5] See, *e.g.*, *In re Rivera-Rioseco*, 19 I. & N. Dec. 833, 835 (B.I.A. 1988); *In re Diaz-Chambrot*, 19 I. & N. Dec. 674, 675-676 (B.I.A. 1988); *In re Sanchez*, 17 I. & N. Dec. 218, 221 (B.I.A. 1980); *In re Kim*, 17 I. & N. Dec. 144, 145-146 (B.I.A. 1979); *In re Newton*, 17 I. & N. Dec. 133, 136-137 (B.I.A. 1979); *In re Anwo*, 16 I. & N. Dec. 293, 295 (B.I.A. 1977); *In re Carrasco*, 16 I. & N. Dec. 195, 196-197 (B.I.A. 1977); *In re Lok*, 15 I. & N. Dec. 720, 721 (B.I.A. 1976).

[6] See, *e.g.*, *In re Gordon*, 20 I. & N. Dec. 52, 56 (B.I.A. 1989) (robbery); *In re Khalik*, 17 I. & N. Dec. 518, 520-521 (B.I.A. 1980) (issuing checks without sufficient funds); *In re Rodriguez-Vera*, 17 I. & N. Dec. 105, 107 (1979) (murder); *Salmon*, 16 I. & N. Dec. at 738-739 (criminal trespass and robbery); *In re Leyva*, 16 I. & N. Dec. 118, 122 (B.I.A. 1977) (sexual perversion and burglary).

[7] See, *e.g.*, *In re Lozada-Duenas*, No. A034-622-043, 8 Immig. Rptr. B1-99 (B.I.A. Aug. 29, 1990); *In re Buscemi*, 19 I. & N. Dec. 628, 635 (B.I.A. 1988); *In re Baig*, No. A020-636-907, 4 Immig. Rptr. B1-57 (B.I.A. Jan. 6, 1987); *In re Mendez*, No. A030-730-909, 3 Im-

The Justice Department's benchbook for immigration judges confirms that immigration officials took an expansive approach during this period in determining eligibility for discretionary relief under Section 212(c). In its list of eligibility requirements, the first printed edition of the benchbook made no reference to whether a comparable ground for exclusion existed, noting only that immigration judges "may also terminate deportation proceedings pursuant to Section 212(c)." U.S. Dep't of Justice, *Immigration Judge Benchbook*, ch. 7, at 7-9 (1st ed. 1986). The second edition of the benchbook did state that, in order to be eligible for discretionary relief under Section 212(c), "concurrent grounds of excludability" must exist. U.S. Dep't of Justice, *Immigration Judge Benchbook*, ch. 7, at 7-11 (2d ed. 1988) (*Benchbook II*). The Justice Department, however, went on to identify only the two categories discussed above—cases involving immigration violations and cases involving convictions for firearms offenses—as categories that failed to satisfy that requirement. *Id*, ch. 7, at 7-11 to 7-12. By contrast, the Justice Department noted that broad categories such as "crimes, narcotics, or smuggling" did satisfy that requirement—and that "waiver[s] may be granted in deportation proceedings" in all of those cases. *Id*, ch. 7, at 7-11.

Moreover, the second edition of the benchbook included an eleven-page model decision for cases in which an alien was seeking discretionary relief in deportation proceedings. See *Benchbook II*, ch. 7, app. 15-1. The model decision walked through several issues that an immigration judge should consider in determining

---

mig. Rptr. B1-129 (B.I.A. Feb. 13, 1986); *Rodriguez-Vera*, 17 I. & N. Dec. at 107.

whether to grant discretionary relief, including (1) whether the alien was deportable by clear and convincing evidence; (2) whether the alien was "statutorily eligible" for discretionary relief because the alien had been appropriately admitted for permanent residence and had spent the requisite time in the United States; and (3) whether the alien "merit[ed] the favorable exercise of discretion" based on rehabilitation, family ties, and other equitable considerations. *Ibid.* The model decision did not even mention as a relevant issue whether a comparable ground for exclusion existed—much less whether the statutory basis for deportation was sufficiently close linguistically to a statutory basis for exclusion. That silence reflects the prevailing understanding that only aliens with prior immigration violations or firearms convictions were disqualified for seeking discretionary relief.

4. In 1990, Congress amended the INA and eliminated the Attorney General's discretion to grant Section 212(c) waivers to aliens who had been convicted of an "aggravated felony" and had served five years in prison. See Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052. At the same time, Congress redefined "aggravated felony" to include crimes of violence that carried a sentence of at least five years. See *id.* § 501, 104 Stat. 5048. Congress thereby implicitly recognized that immigration officials would have the discretion to grant relief to those aliens who had been convicted of "aggravated felonies" but had ultimately served shorter sentences. The amendments strongly suggest that Congress intended to ratify the longstanding practice of permitting aliens in deportation proceedings to seek Section 212(c) waivers, because "aggravated felonies" had previously been added to the INA as a categorical statutory basis for *deportation* but not for exclusion. See An-

ti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7344, 102 Stat. 4470-4471.

Accordingly, amici and others who interpreted and enforced the immigration laws understood that Congress had sanctioned the preexisting approach to determining eligibility for discretionary relief under Section 212(c). See, *e.g.*, *In re Roberts*, 20 I. & N. Dec. 294, 298 n.2 (B.I.A. 1991); *In re Meza*, 20 I. & N. Dec. 257, 259 (B.I.A. 1991). In an opinion written by amicus (and then-Deputy General Counsel) Paul W. Virtue, the INS Office of General Counsel stated that "Section 212(c) provides relief from exclusion, and by court decision from deportation, to persons who have had unrelinquished domicile in the United States for seven years and are excludable for all but certain subversive reasons." U.S. Dep't of Justice, INS, Office of General Counsel, *Availability of 212(c) Relief for LPRs Who Are Excludable Under 212(a)(6)(E)(i)*, Genco Op. No. 93-23 (INS), available at 1993 WL 1503970 (Mar. 16, 1993) (quotation marks omitted).

If a close linguistic comparison of the statutory bases for deportation and exclusion had been a prerequisite for discretionary relief, the 1990 amendment to the INA would have effected a major change in the availability of discretionary relief. Congress left discretionary waivers under Section 212(c) available for aliens who had been convicted of "aggravated felonies" but had *not* served five years in prison—despite the absence of a corresponding statutory category of "aggravated felonies" that served as a basis for exclusion. If a close linguistic comparison were required, immigration officials would surely have argued that, because there was no precise corresponding category for purposes of exclusion, an alien who had been convicted of an "aggravated felony" was categorically ineligible for discretionary relief in deportation proceedings. Such an argument would potentially

have enabled immigration officials to defeat requests for discretionary relief at the threshold in a substantial number of cases.

To the contrary, and again consistent with their prior practice, immigration officials were generally unconcerned with analyzing whether a comparable ground for exclusion existed in cases involving convictions for "aggravated felonies," despite the wide variety of offenses that fell within that category. Immigration officials broadly assumed that, "[f]or aliens who are established in this country as longtime lawful permanent residents, relief from deportation under [S]ection 212(c) * * * may be available *notwithstanding the conviction of an aggravated felony*." *In re K-*, 20 I. & N. Dec. 418, 425 (B.I.A. 1991) (emphasis added).

In the majority of cases involving "aggravated felonies," therefore, the BIA based its determination of whether discretionary relief should be granted on the merits of the application, rather than on the threshold issue of eligibility.[8] In cases in which the BIA determined that aliens who had been convicted of "aggravated felonies" were ineligible for discretionary relief, it did so for reasons other than the deportation grounds for which they had been charged. For example, the BIA found that some aliens had not spent the requisite seven years in the United States,[9] and that others were ineligible be-

---

[8] See, *e.g.*, *In re D-*, 20 I. & N. Dec. 915, 919 (B.I.A. 1994); *In re Rodriguez-Cortes*, 20 I. & N. Dec. 587, 590-591 (B.I.A. 1992); *In re Ramirez-Somera*, 20 I. & N. Dec. 564, 567 (B.I.A. 1992); *In re Silva-Rodriguez*, 20 I. & N. Dec. 448, 450 (B.I.A. 1992); *Roberts*, 20 I. & N. Dec. at 303.

[9] See, *e.g.*, *In re D-*, 20 I. & N. Dec. 827, 830 (B.I.A. 1994); *In re Reyes*, 20 I. & N. Dec. 789, 790 (B.I.A. 1994); *In re Monterrosa-*

cause they had served more than five years in prison for an "aggravated felony."[10] In the rare cases involving convictions for "aggravated felonies" in which the BIA considered whether a comparable ground for exclusion existed, it concluded that the alien was eligible for discretionary relief.[11] The BIA departed from this understanding only when the alien was also deportable for conduct triggering one of the two exceptions to the availability of discretionary relief.[12]

5. In 1996, Congress repealed Section 212(c) altogether. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597. The BIA initially took the position that Congress had eliminated discretionary relief under Section 212(c) even for aliens who had pleaded guilty to criminal offenses before IIRIRA's enactment. See, *e.g.*, *In re Truong*, 22 I. & N. Dec. 1090, 1097-1098 (B.I.A. 1999). In some circuits, where the law continued to permit those aliens to seek discretionary relief, immigration officials continued to make other arguments as to why the aliens were ineligible. See, *e.g.*, *Mezrioui* v. *INS*, 154 F. Supp. 2d 274, 275-276 (D. Conn. 2001); *In re Davis*, 22 I. & N. Dec. 1411, 1414 (B.I.A. 2000). Immigration officials, however, continued to be

---

Maitland, No. A014-818-584, 12 Immig. Rptr. B1-57 (B.I.A. Aug. 3, 1993).

[10] See, *e.g.*, *In re Llerenas-Ceballos*, No. A034-011-098, 14 Immig. Rptr. B1-87 (B.I.A. Apr. 18, 1995); *In re Gomez-Giraldo*, 20 I. & N. Dec. 957, 963-964 (B.I.A. 1995).

[11] See, *e.g.*, *In re Garbiras-Gandica*, No. A036-438-625, 12 Immig. Rptr. B1-141 (B.I.A. Nov. 5, 1993); *Meza*, 20 I. & N. Dec. at 259-260.

[12] See, *e.g.*, *In re K-L-*, 20 I. & N. Dec. 654, 658 (B.I.A. 1993); *In re Chow*, 20 I. & N. Dec. 647, 651 (B.I.A. 1993).

largely unconcerned with whether a comparable ground for exclusion existed, even in cases involving convictions for "aggravated felonies." See, *e.g.*, *Mezrioui*, 154 F. Supp. 2d at 279-280.

6. In 2001, this Court held that it would have been impermissibly retroactive for Congress to have eliminated discretionary relief for aliens who had relied on its availability when pleading guilty to an offense. See *INS* v. *St. Cyr*, 533 U.S. 289, 326 (2001). As a result of that decision, discretionary relief remained available to aliens in deportation proceedings whose criminal convictions predated IIRIRA. And as to those aliens, immigration officials continued to take the same general approach in determining whether aliens who had pleaded guilty before the repeal were eligible for discretionary relief. In cases involving immigration violations or convictions for firearms offenses, the BIA continued to determine that aliens were ineligible for relief. See, *e.g.*, *In re Phom*, No. A027-394-995, 2004 WL 2952183, at *1 (B.I.A. Nov. 4, 2004); *In re Ortiz-Campas*, No. A036-913-872, 2004 WL 2375114, at *1 (B.I.A. Sept. 23, 2004). On the other hand, the BIA generally continued to treat aliens who had been convicted of "aggravated felonies" as eligible.[13] The vast majority of applications for discretionary relief continued to be decided on the merits,[14] including in cas-

---

[13] See, *e.g.*, *In re Hussein*, No. A026-416-298, 2004 WL 1059601, at *1 (B.I.A. Mar. 15, 2004); *In re Reyes Manzueta*, No. A093-022-672, 2003 WL 23269892, at *2 (B.I.A. Dec. 1, 2003); *In re Munoz*, No. A035-279-774, 28 Immig. Rptr. B1-1 (B.I.A. Aug. 7, 2003) (Pet. App. 45a-55a); but see *In re Patarroyo-Sanchez*, No. A042-279-463, 2004 WL 1739093, at *4 (B.I.A. June 18, 2004).

[14] See, *e.g.*, *In re Ranglin*, No. A041-458-034, 2005 Immig. Rptr. LEXIS 20724, at *3 (B.I.A. Mar. 15, 2005); *In re Brienza-Schettino*, No. A037-194-060, 2005 Immig. Rptr. LEXIS 21294, at *3 (B.I.A.

es involving convictions for violent offenses.[15] Some of those applications, moreover, were ultimately successful. See, *e.g.*, *In re S-Lei*, No. A038-139-424 (B.I.A. May 27, 2004) (Pet. App. 57a-58a) (second-degree attempted robbery); *In re Reyes Manzueta*, No. A093-022-672, 2003 WL 23269892, at *2 (B.I.A. Dec. 1, 2003) (first-degree manslaughter).

Mar. 14, 2005); *In re Valdez*, No. A041-299-144, 2005 Immig. Rptr. LEXIS 8076, at *3 (B.I.A. Mar. 2, 2005); *In re Guzman*, No. A040-522-914, 2005 Immig. Rptr. LEXIS 9375, at *7 (B.I.A. Jan. 19, 2005); *In re Je Young Joung*, No. A035-003-510, 2004 WL 2375124, at *1 (B.I.A. Sept. 28, 2004); *In re Nunez-Soto*, No. A091-330-661, 2004 WL 1398703, at *1 (B.I.A. Apr. 15, 2004); *In re Miller*, No. A030-343-525, 2004 WL 848531, at *1 (B.I.A. Mar. 1, 2004); *In re Garza*, No. A090-967-482, 2004 WL 2374468, at *2 (B.I.A. July 20, 2004); *In re Reyes-Hernandez*, No. A037-202-672, 2004 WL 1059596, at *2 (B.I.A. Mar. 15, 2004); *In re Ogunde*, No. A028-398-927, 2003 WL 23521885, at *1 (B.I.A. Nov. 10, 2003); *In re Pacheco*, No. A012-007-546, 25 Immig. Rptr. B1-46 (B.I.A. Mar. 29, 2003); *In re Cammack*, No. A030-756-066, 26 Immig. Rptr. B1-25 (B.I.A. July 9, 2002); *In re Das Nevas Cale*, No. A013-167-371, 24 Immig. Rptr. B1-264 (B.I.A. Feb. 8, 2002).

[15] See, *e.g.*, *In re Segoviano-Mendoza*, No. A091-577-720, 2004 WL 2374479, at *4 (B.I.A. July 27, 2004) (third-degree rape); *In re Caro-Lozano*, No. A090-870-395, 2004 WL 1398661, at *1-*2 (B.I.A. Apr. 22, 2004) (attempted rape); *Hussein*, 2004 WL 1059601, at *1 (indecency with a child); *In re Loney*, No. A035-770-136, 2004 WL 1167256, at *1 (B.I.A. Feb. 10, 2004) (robbery); *In re Vongvixay*, No. A023-882-967, 2003 WL 23216741, at *1 (B.I.A. Sept. 29, 2003) (first-degree sexual assault); *In re Munoz*, No. A035-279-774, 28 Immig. Rptr. B1-1 (B.I.A. Aug. 7, 2003) (Pet. App. 45a-55a) (aggravated assault on a peace officer); *In re Rowe*, No. A037-749-964 (B.I.A. May 9, 2003) (Pet. App. 41a-44a) (second-degree robbery); *In re Lopez-Jimenez*, No. A036-410-813, 25 Immig. Rptr. B1-125 (B.I.A. Mar. 24, 2002) (attempted robbery).

B. In *Blake*, The BIA Applied A New And Considerably More Stringent Test For Determining When An Alien Is Entitled To Discretionary Relief In Deportation Proceedings

When the longstanding approach to determining eligibility for discretionary relief under Section 212(c) is taken as the starting point, the BIA's decision in *Blake* represents a radical departure. In *Blake*, the alien had been convicted of first-degree sexual abuse of a person under 11 years old—an offense that made him deportable for "sexual abuse of a minor." Such convictions had previously been treated as a valid basis for discretionary relief on the ground that the offense was comparable to "crimes involving moral turpitude"—a statutory ground for exclusion. 23 I. & N. Dec. at 727; see *In re Hussein*, No. A026-416-298, 2004 WL 1059601, at *3 (B.I.A. Mar. 15, 2004).

The BIA nevertheless concluded that the alien was ineligible for discretionary relief. See *Blake*, 23 I. & N. Dec. at 729. The BIA reasoned that "whether a ground of deportation or removal has a statutory counterpart in the provisions for exclusion or inadmissibility turns on whether Congress has employed similar language to describe substantially equivalent categories of offenses." *Id.* at 728. Applying that "similar language" standard, the BIA concluded that, "although there may be considerable overlap between offenses categorized as sexual abuse of a minor and those considered crimes of moral turpitude, these two categories of offenses are not statutory counterparts." *Ibid.* The BIA subsequently extended that standard to other types of "aggravated felonies." See *In re Brieva-Perez*, 23 I. & N. Dec. 766, 773 (B.I.A. 2005).

The BIA's new approach in *Blake*—under which an alien is eligible for discretionary relief only when the sta-

tutory basis for deportation closely corresponds linguistically with a statutory basis for exclusion—"came as a veritable shock to immigration law practitioners." Gerald Seipp, *Criminal and Related Grounds of Inadmissibility and Deportability—Similarities, Differences, and Anomalies with an Attitude*, 08-03 Immigr. Briefings 1 (2008). The Eleventh Circuit described *Blake* as a "watershed moment in [Section] 212(c) jurisprudence." *De la Rosa* v. *Attorney General*, 579 F.3d 1327, 1332 (11th Cir. 2009), cert. denied, 130 S. Ct. 3272 (2010). And the BIA itself acknowledged *Blake* as "announc[ing]" a new standard, see *In re Umer*, No. A038-802-967, 2010 WL 1606998, at *3 (B.I.A. Mar. 31, 2010), and precipitating a "change in law" that may "preclude a grant of 212(c) relief" in some cases, *In re Cardona*, No. A040-065-318, 2005 WL 3709244, at *1 (B.I.A. Dec. 27, 2005).

In the experience of amici, the BIA's new approach has had dramatic real-world consequences for aliens who are longtime residents of the United States. In *In re Paredes-Osuna*, No. A038-975-297, 2006 Immig. Rptr. LEXIS 12680 (B.I.A. Aug. 1, 2006), the alien had been convicted of voluntary manslaughter. See *id.* at *2. As the BIA recognized, if the alien had sought discretionary relief upon entering the United States, he would have been eligible on the ground that "voluntary manslaughter is a crime involving moral turpitude." *Ibid.* Before the BIA's decision in *Blake*, moreover, immigration officials had recognized that aliens who had been convicted of voluntary manslaughter were eligible for discretionary relief—and, indeed, had even awarded relief to such aliens. See, *e.g.*, *In re Reyes Manzueta*, No. A093-022-672, 2003 WL 23269892, at *2 (B.I.A. Dec. 1, 2003). In *Paredes-Osuna*, however, the BIA concluded that, under the standard articulated in *Blake*, the alien was not eligible for discretionary relief. See 2006 Immig. Rptr.

LEXIS 12680, at *2. Similarly, in other cases, the BIA vacated or reversed the decisions of immigration judges in light of its decision in *Blake*. See, *e.g.*, *In re Banuelos-Delena*, No. A092-789-794, 2006 WL 901335, at *1 (B.I.A. Mar. 2, 2006); *In re Gomez-Perez*, No. A037-447-529, 2006 WL 901334, at *1-*2 (B.I.A. Mar. 1, 2006); *In re Rangel-Zuazo*, No. A090-640-428 (B.I.A. May 25, 2005) (Pet. App. 59a-61a).

If the BIA's new approach is allowed to stand, the eligibility of aliens for discretionary relief will turn on the fortuity of whether they happen to have been charged with inadmissibility or deportability—and, indeed, on whether they happen to have been placed into removal proceedings before or after *Blake*'s harsh new rule came into effect. As then-Attorney General Jackson determined more than seventy years ago, however, whether an alien receives a "fresh judgment" on eligibility to live in the United States "ought not to depend upon the technical form of the proceedings." *L-*, 1 I. & N. Dec. at 5. For the reasons given by petitioner, the BIA's dramatic limitation on the availability of discretionary relief is arbitrary and impermissibly retroactive. This Court should reaffirm the availability of discretionary relief for aliens in deportation proceedings whose criminal convictions predated the repeal of Section 212(c), and reinstitute the preexisting and well-established standards for determining eligibility for that relief.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

KANNON K. SHANMUGAM
ANA C. REYES
BURDEN H. WALKER*
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

JULY 2011

---

* Admitted in South Carolina and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Bar Rule 49(c)(8).

AMICUS CURIAE BRIEF

RECEIVED
AND
FILED

No. 10-694

JUL 12 2011
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL LEGAL AID & DEFENDER ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Joshua L. Dratel
Co-Chair, Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
JOSHUA L. DRATEL, P.C.
2 Wall Street, Third Floor
New York, NY 10005
(212) 732-0707

Edwin A. Burnette
Vice President, Defender Legal Services
NATIONAL LEGAL AID & DEFENDER ASSOCIATION
1140 Connecticut Ave. NW
Suite 900
Washington, DC 20036
(202) 452-0620

Iris E. Bennett*
Matthew S. Hellman
Sean J. Hartigan
James C. Cox
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
ibennett@jenner.com

*Counsel of Record

Attorneys for Amici Curiae

July 12, 2011

Library of Congress

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. PRIOR TO 1996, LAWFUL PERMANENT RESIDENTS IN PETITIONER'S POSITION PLEADED GUILTY IN REASONABLE RELIANCE ON THE RIGHT TO SEEK SECTION 212(C) RELIEF FROM DEPORTATION 5

A. Consistent With The State Of The Law At That Time, Lawful Permanent Residents Were Advised That They Could Apply For Section 212(c) Relief If Convicted Of Any Deportable Crime, With Limited Exceptions Not Applicable To Individuals Such As Petitioner. 8

B. Practice Aides And Training Programs Instructed Defense Lawyers That Lawful Permanent Residents Could Apply For Section 212(c) Relief If Convicted Of Any Deportable Crime, With Limited Exceptions Not Applicable To Individuals Such As Petitioner. 11

C. Lawful Permanent Residents Relied On This Guidance Of Competent Defense Counsel When Pleading Guilty To Crimes. ... 19

II. THE RULE IN *BLAKE* AND *BRIEVA-PEREZ* HAS THE IMPERMISSIBLE RETROACTIVE EFFECT THAT *ST. CYR* HELD CONGRESS DID NOT INTEND. 25

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 29

Cato v. INS, 84 F.3d 597 (2d Cir. 1996) 10

Farquharson v. United States Attorney General, 246 F.3d 1317 (11th Cir. 2001) 11

Glover v. United States, 531 U.S. 198 (2001) 21

Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984) 30

INS v. St. Cyr, 533 U.S. 289 (2001) 3, 4, 5, 6, 20-21, 24, 27, 29, 30

Matter of Esposito, 21 I. & N. Dec. 1 (BIA 1995) 10

Matter of Meza, 20 I. & N. Dec. 257 (BIA 1992) 9

Matter of Blake, 23 I. & N. Dec. 722 7

Matter of Brieva-Perez, 23 I. & N. Dec. 766 (2005) 7

Matter of Hernandez-Casillas, 20 I. & N. Dec. 262 (Att'y Gen. 1991) 10

Matter of Montenegro, 20 I. & N. Dec. 603 (BIA 1992) 10

Matter of Reyes Manzueta, 2003 WL 23269892 (BIA Dec. 1, 2003) 28

Matter of Rodriguez-Cortes, 20 I. & N. Dec. 587 (BIA 1992) 10, 28

Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997), *motion to withdraw appeal granted sub nom. Yesil v. Reno*, 175 F.3d 287 (2d Cir. 1999) 19-20

Padilla v. Kentucky, 130 S. Ct. 1473 (2010) ... 8, 19, 20, 21, 22, 24

SEC v. Chenery Corp., 332 U.S. 194 (1947) 29

STATUTES

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 3009-589 3

8 U.S.C. § 1182(a) 3

8 U.S.C. § 1227(a) 3

OTHER AUTHORITIES

ABA Standards for Criminal Justice, Pleas of Guilty (2d ed.), Standard 14-3.2, commentary (1982) 22

ABA Standards for Criminal Justice, Pleas of Guilty (3d ed.), Standard 14-3.2(f), commentary (1999) 22

Affidavit of Dennis R. Murphy filed with amicus curiae brief of the National Association of Criminal Defense Lawyers & the National Legal Aid and Defender Association before the Attorney General in *Matter of Soriano*, Int. Dec. 3289 on Apr. 30, 1998 21

Larry Ainbinder, updated by Hilary Hochman, *Special Considerations in Representing the Non-Citizen Defendant in Federal Defenders of San Diego, Inc., Defending a Federal Criminal Case* (1995 ed.) 14, 15

Jan Joseph Bejar, *Representing Aliens in Criminal Proceedings: Some Pitfalls for the Criminal Practitioner to Avoid* (1994) 17

James A. Benzoni, *Defending Aliens in Criminal Cases* (training materials for criminal defense lawyers CLE program in Iowa 1994-1997) 18

Brief for National Association of Criminal Defense Lawyers, et al., as *Amici Curiae*, *St Cyr.* 533 U.S. 289 (2001) (No. 00-767), 2001 WL 306179 6

Katherine A. Brady, et al., Immigrant Legal Resource Center, *California Criminal Law and Immigration* (1995 ed.) 13

Katherine Brady, Immigrant Legal Resource Center, *Public Defenders' Handbook on Immigration Law: Update* (Update Jan. 1989) 21

Katherine A. Brady & David S. Schwartz, *Public Defenders' Handbook on Immigration Law* (California Public Defenders Association, 1988 ed.) 14, 27

Katherine A. Brady & David S. Schwartz, *Public Defenders' Handbook on Immigration Law* (California Public Defenders Association, 1989 2d ed.) ... 14, 16, 28

Sarah M. Burr, Legal Aid Society, *Immigration Consequences of Criminal Convictions for Non-Citizen Clients* (1991) 16

Victor Castro & Benardo Saucedo, Criminal Law Section of the Santa Clara County Bar Association, *Immigration Consequences in Criminal Law* (Oct. 18, 1995) 18

Continuing Education of the Bar ("CEB"), *California Criminal Law: Procedure and Practice* (3d ed. 1994-1996) 13

Declaration of Cristina Arguedas, filed originally in *Jun Li Tam v. Reno*, No. 99-15775 (9th Cir. Feb. 22, 1999) 20

Declaration of Katherine A. Brady, filed originally in *In re Resendiz*, No. S078879 (Cal. Jan. 7, 1999) 12, 17

Declaration of Larry Kupers, filed originally in *Jun Li Tam v. Reno*, No. 99-15775 (9th Cir. Feb. 22, 1999) 19

Tova Indritz, Orientation Seminar for Assistant Federal Defenders, *Representing a Non-Citizen Client in a Criminal* Case (Phoenix, Arizona, Nov. 7-11, 1994) 17, 21

Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law & Crimes* (1988 ed.) 16

Lodging to Brief of *Amici Curiae* NACDL, et al., *INS v. St. Cyr*, 533 U.S. 289 (No. 00-767) 13

NLADA Performance Guidelines for Criminal Defense Representation, Guidelines (1994) 22

Robert Pauw & Jay Stansell, Northwest Immigrant Rights Project, *Immigration Consequences of Criminal Convictions* (1995 ed.) 15

Robert Pauw & Jay Stansell, Northwest Immigrant Rights Project, *Immigration Consequences of Criminal Convictions* (1992 ed.) 15

Jenny Roberts, *Proving Prejudice, Post-*Padilla, 54 How. L.J. 693 (2011) 24

S. Ct. R. 32.3 13

INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 12,500 members nationwide, joined by 35,000 members of 90 affiliate organizations in all 50 states. Founded in 1958, NACDL promotes criminal law research, advances and disseminates knowledge in the area of criminal practice, and encourages integrity, independence, and expertise among criminal defense counsel. NACDL's members include criminal defense lawyers, U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The National Legal Aid & Defender Association ("NLADA"), founded in 1911, is this country's oldest and largest nonprofit association of individual legal professionals and legal organizations devoted to ensuring the delivery of legal services to the poor. For one hundred years, NLADA has secured access to justice for people who cannot afford counsel through the creation and improvement of legal institutions, advocacy, training and the development of nationally applicable standards. NLADA

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

promotes the fair, transparent, efficient and uniform administration of criminal justice, and serves as the collective voice for both civil legal services and public defense services throughout the nation.

Many of the members of NACDL and NLADA are called upon to give legal advice to lawful permanent resident clients regarding the immigration consequences of criminal proceedings in connection with those clients' decisions as to whether to enter into a guilty plea. Many provided such advice prior to the 1996 repeal of former Section 212(c) of the Immigration and Nationality Act. The decision of the court and Board of Immigration Appeals ("BIA") below would have the effect of retroactively rendering an essential element of that advice inaccurate: advice that discretionary relief under former Section 212(c) was available in deportation proceedings to lawful permanent residents who pleaded guilty prior to 1996 and remained in the country, with only two relatively limited exceptions, namely, firearms offenses, and aggravated felony offenses for which five or more years in prison have been served. NACDL's and NLADA's members did not advise their lawful permanent resident clients pleading guilty to other offenses that in order to seek Section 212(c) relief they would have to leave the country, either to trigger exclusion proceedings and an opportunity to seek relief in that context upon their return, or to gain the ability to obtain "*nunc pro tunc*" relief from exclusion that would also operate to relieve deportability.[2] Thus, NACDL and NLADA

---

[2] In 1996, Congress began using the term "inadmissible" in lieu of "excludable" and developed a single "removal" proceeding for

have an interest in ensuring that Section 212(c) relief, which this Court has already ruled was not eliminated by Congress retroactively, not be eviscerated retroactively by way of BIA decision for a vast swath of legal permanent residents who pleaded guilty to deportation-triggering offenses prior to 1996.

SUMMARY OF ARGUMENT

When thousands of lawful permanent residents chose to plead guilty to criminal offenses prior to 1996, they generally did so with the advice of counsel that they would be entitled to seek discretionary relief from deportation under Section 212(c) of the Immigration and Naturalization Act. After Congress repealed Section 212(c), this Court held in *INS v. St. Cyr*, 533 U.S. 289 (2001), that "familiar considerations of fair notice, reasonable reliance, and settled expectations" dictated that such discretionary relief should remain available to people who entered their pleas before the law changed. *Id.* at 323 (quotation marks omitted). The Court specifically concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or proceed to trial," given that "competent

---

both inadmissible and deportable aliens. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 3009-589. This change was one of nomenclature only, as the statutory distinction between the two categories of individuals remains. *Compare* 8 U.S.C. § 1182(a) (inadmissibility) *with id.* § 1227(a) (deportability). This brief uses the terms "deportation" and "exclusion" where applicable to the analysis under former Section 212(c).

defense counsel, following the advice of numerous practice guides, would have advised [them] of the provision's importance." *Id.* at 321-23 & n.50. In reaching this conclusion, this Court cited evidence marshaled in an *amici* brief submitted by NACDL and other associations of public and private criminal defense lawyers. *Id.*

This case threatens the same disruption of justified reliance interests that this Court held in *St. Cyr* was not permissible, with only a minor twist. The agency interpretation that was struck down in *St. Cyr* would have cut off Section 212(c) relief for all lawful permanent residents with pre-repeal guilty pleas to crimes for which Congress had eliminated this form of relief. The agency interpretation affirmed by the decision below would have the same effect, except that it would be limited to lawful permanent residents whose convictions would not have precluded Section 212(c) relief in a deportation proceeding prior to 1996, but who remained in the country after pleading guilty to their deportation-triggering offenses. Yet the expectations of the members of this subset of lawful permanent residents with pre-1996 convictions were no different than the expectations of Enrico St. Cyr and other members of the larger group. At the time of their pre-1996 guilty pleas, both sets of people would have been advised by counsel that they could seek discretionary relief under Section 212(c) if later found to be excludable or deportable *regardless of whether or not they remained in the country.*

This conclusion is borne out in the same sources this Court relied on in *St. Cyr* – the practice guides

and training programs used by the criminal defense bar to advise its clients on immigration issues. And it is borne out in the pre-1996 law, which confirms that in all relevant respects, the availability of Section 212(c) relief was identical in the deportation and exclusion contexts. *St. Cyr* held that these considerations demonstrated that Congress did not intend to retroactively withdraw Section 212(c) from those that relied upon its availability. These same considerations also demonstrate that the government has no basis to adopt an administrative interpretation of Section 212(c) that would achieve much the same retroactive effect.

ARGUMENT

I. PRIOR TO 1996, LAWFUL PERMANENT RESIDENTS IN PETITIONER'S POSITION PLEADED GUILTY IN REASONABLE RELIANCE ON THE RIGHT TO SEEK SECTION 212(C) RELIEF FROM DEPORTATION.

In *St. Cyr*, this Court held that the 1996 Amendments to the INA did not affect the availability of Section 212(c) relief for convictions obtained by guilty pleas occurring before the amendments' enactment. 533 U.S. 289. The Court reasoned that eliminating "any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief" constituted an unfair retroactive impact not clearly intended by Congress. *Id.* at 321 (quotation marks omitted).

In arriving at this holding, the Court relied in part on a brief submitted by *amici* NACDL and criminal defense associations from around the

country. *Id.* at 323 & n.50. That brief canvassed a wide array of criminal defense practice aides, training programs, and expert declarations that illuminated the type of advice that lawful permanent resident criminal defendants received from their attorneys prior to 1996 about the immigration consequences of pleading guilty. *See* Brief for National Association of Criminal Defense Lawyers, et al., as *Amici Curiae*, *St Cyr*, 533 U.S. 289 (2001) (No. 00-767), 2001 WL 306179. The materials presented by amici in *St. Cyr* established that prior to 1996 lawful permanent resident criminal defendants were routinely advised by their defense counsel about the availability of Section 212(c) relief in connection with deciding whether to accept a guilty plea. And as this Court recognized, the materials showed that "preserving the possibility of [Section 212(c)] relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *St. Cyr*, 533 U.S. at 323 & n.50.

The same evidence that was before this Court in *St. Cyr* reflects that the consistent and well-established practice of competent defense counsel prior to 1996 was not merely to assert the existence of Section 212(c) relief in general terms. Rather, competent criminal defense counsel routinely advised their lawful permanent resident clients, consistent with the "statutory counterpart" rule as it was then applied, that Section 212(c) relief would be available for most offenses, with narrowly delineated exceptions. More specifically, defense counsel advised these clients that the exceptions were

limited to crimes involving firearms (because typically such offenses would not have provided a basis for exclusion and therefore had no statutory counterpart) and aggravated felony offenses where the defendant has served a term of imprisonment of more than five years (circumstances that Congress had expressly provided in the Immigration Act of 1990 would bar Section 212(c) relief). This advice was based on administrative and judicial case law, as well as the "in the trenches" expertise of practitioners who had dealt with hundreds of deportation proceedings and requests for Section 212(c) relief over the years.

Yet, beginning in 2005 with its decisions in *Matter of Blake*, 23 I. & N. Dec. 722 (BIA 2005), and *Matter of Brieva-Perez*, 23 I. & N. Dec. 766 (BIA 2005), the BIA adopted the view that Section 212(c) relief for pre-1996 criminal convictions is limited to only those deportation grounds that have a "closely-worded" counterpart in the grounds for exclusion. Under this interpretation, a large number of lawful permanent residents who pleaded guilty prior to 1996 – including lawful permanent residents who pleaded guilty to offenses constituting aggravated felony crimes of violence, such as Petitioner – are ineligible for Section 212(c) relief in a deportation proceeding. This is the case under the BIA's interpretation even though the same individuals would be eligible to seek this discretionary relief if they were to travel outside the United States and upon their return were placed in exclusion proceedings based on those same pre-1996 convictions. Moreover, and of special concern to

amici, this interpretation is contrary to how these lawful permanent resident defendants were advised in connection with their pre-1996 guilty pleas by their defense counsel, as it was not the state of the law prior to 2005.

As this Court recently recognized in *Padilla v. Kentucky*, criminal defense counsel are ethically obliged to inform their clients about the immigration consequences of a guilty plea. 130 S. Ct. 1473, 1482 (2010). Their clients in turn rely on that advice, and in the case of lawful permanent resident defendants this advice often matters to them even more than advice concerning the criminal law consequences of a plea. Accordingly, if this Court were to permit the approach the BIA has adopted, it would retroactively make erroneous the advice given by criminal defense counsel to innumerable lawful permanent resident clients regarding the types of convictions that would preserve eligibility for Section 212(c) relief.

A. Consistent With The State Of The Law At That Time, Lawful Permanent Residents Were Advised That They Could Apply For Section 212(c) Relief If Convicted Of Any Deportable Crime, With Limited Exceptions Not Applicable To Individuals Such As Petitioner.

At the outset, it is important to recognize that the law and practice governing Section 212(c) eligibility was clear prior to the BIA's decisions in *Blake* and *Brieva-Perez*. Prior to the repeal of Section 212(c), criminal defense lawyers advised their lawful permanent resident clients that they could seek discretionary relief from deportation based on a

guilty plea to a deportable offense – with very limited exceptions – regardless of whether or not they left the country following their plea. This consistent practice by the criminal defense community was based on the statutory counterpart rule as it was applied at that time.

There are numerous BIA cases confirming that this advice represented a noncontroversial understanding of the statutory counterpart rule. Specifically, pre-*St. Cyr* cases make clear that the key question for application of the statutory counterpart rule was whether the lawful permanent resident's conviction that was the basis for deportation could also serve as grounds for exclusion – not whether equivalent language was employed in the immigration statute to describe the basis for deportation and the basis for exclusion. As most convictions were understood to constitute grounds for both deportation and exclusion – typically as crimes involving moral turpitude – Section 212(c) relief was generally available for criminal convictions in both types of proceedings, including aggravated felony convictions, with only narrow exceptions. This was true even though the INA's deportation provisions, but not its exclusion provisions, utilized the words "aggravated felony" to identify certain deportation grounds. *See, e.g., Matter of Meza*, 20 I. & N. Dec. 257, 259 (BIA 1991) (characterizing the analysis as whether "conviction for [a particular] felony . . . could also form the basis for excludability" and explaining that "a waiver under section 212(c) is not unavailable to an alien convicted of an aggravated felony simply because

there is no ground of exclusion which recites the words, 'convicted of an aggravated felony'"); *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 287 (Att'y Gen. 1991) ("[A]n alien subject to deportation must have the same opportunity to seek discretionary relief as an alien who has temporarily left this country and, upon reentry, been subject to exclusion."); *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 590-91 (BIA 1992) (murder conviction does not preclude application for section 212(c) relief) *See also* Petitioner's Brief at 4-22 (discussing the statutory counterpart rule).

In fact, based on the application of the statutory counterpart rule prevailing before *Blake* and *Brieva-Perez,* there were primarily two grounds for deportation that could not also form the basis for exclusion: firearms offenses and entry without inspection.[3] Neither of these grounds afforded the

---

[3] *See, e.g., Matter of Rodriguez-Cortes*, 20 I. & N. Dec. at 589 ("In order to determine if the respondent is eligible for a section 212(c) waiver of inadmissibility, we must address the question whether she is deportable pursuant to section 241(a)(2)(C) of the Act[, covering firearms offenses]."); *Matter of Esposito*, 21 I. & N. Dec. 1, 10 (BIA 1995) ("[W]e note that . . . no court which has addressed the issue has held that a section 212(c) waiver is available to waive deportability on the ground of a firearms offense. . . . the respondent is ineligible for relief under section 212(c) of the Act because he has been found deportable under a ground of deportation which does not itself have a comparable ground of exclusion."); *Matter of Montenegro*, 20 I. & N. Dec. 603, 604-05 (BIA 1992) ("[E]ven after the 1990 revisions, there is no corresponding exclusion ground to the charge of deportability under section 241(a)(2)(C) of the Act," covering firearms offenses.); *Cato v. INS*, 84 F.3d 597 (2d Cir. 1996) (holding that the deportation grounds of a weapons offense had

possibility of seeking Section 212(c) relief in a deportation proceeding, because neither was a basis for excludability. Thus, necessarily, there could be no application for Section 212(c) relief from exclusion on those grounds.

Defense counsel, who were obligated to inform their clients of the immigration consequences of a criminal conviction, *see infra*, relied on this body of case law in advising their clients. And as we explain in the next section, the teachings of that case law were consistently reflected in the practice guides and expert trainings for criminal defense attorneys at that time.

B. Practice Aides And Training Programs Instructed Defense Lawyers That Lawful Permanent Residents Could Apply For Section 212(c) Relief If Convicted Of Any Deportable Crime, With Limited Exceptions Not Applicable To Individuals Such As Petitioner.

The starting point for any criminal defense lawyer seeking to understand the immigration consequences of a noncitizen's guilty plea would be the criminal defense practice guides governing that defense lawyer's state or federal law criminal practice. Prior to the BIA's decisions in *Blake* and *Brieva-Perez*, the practice guides looked to by criminal defense attorneys across the country taught that Section 212(c) relief would be available for

---

no statutory counterpart in 212(a)); *Farquharson v. U.S. Att'y Gen.*, 246 F.3d 1317, 1324 (11th Cir. 2001) ("Farquharson is deportable on the statutory ground of entry without inspection, for which there is no analogous ground for exclusion.").

lawful permanent residents convicted of a wide array of offenses prior to 1996. These guides took into account the statutory counterpart rule by further instructing as to the – at the time – very limited situations in which the nature of the offense would preclude a lawful permanent resident from seeking 212(c) relief in a deportation proceeding.

These materials are the same materials that were before this Court in the *St. Cyr* matter. Thus, the same evidence that led this Court to conclude that lawful permanent residents would have been advised by competent defense counsel of the existence of 212(c) relief generally also demonstrates that this advice specifically included advising lawful permanent residents that the only criminal offenses for which they would not be eligible to seek relief would be firearms offenses, as well as (after 1990) aggravated felonies for which a term of more than five years was actually served.[4]

For example, in California, the state in which Petitioner pleaded guilty to his underlying crime, the basic "bible" of criminal defense for California practitioners, *California Criminal Law: Procedure and Practice*, contains a full chapter devoted to "Representing the Noncitizen Criminal Defendant." *See* Declaration of Katherine A. Brady at 2 filed in *In re Resendiz*, No. S078879 (Cal. Jan. 7, 1999).[5] The

---

[4] The guides generally did not discuss the unavailability of 212(c) relief to entry without inspection deportations because the guides were concerned with the immigration consequences of criminal convictions, not entry without inspection.

[5] With the exception of the 1988 edition of the treatise *Immigration Law and Crimes*, *see infra* pp.15-16, the materials

1996 edition of that chapter stated that "[w]ith two exceptions, the [Section 212(c)] waiver can excuse any ground of exclusion or deportation." Continuing Education of the Bar ("CEB"), *California Criminal Law: Procedure and Practice* § 48.22 (3d ed. 1994-1996). The first exception cited was offenses "involving firearms or destructive devices." *Id.* The second was "a person who has served a total of five years for conviction of one or more aggravated felonies." *Id.* Another highly-respected guide for California practitioners, published by immigration law experts at the Immigrant Legal Resource Center and entitled *California Criminal Law and Immigration*, explained in 1995 that relief under 212(c) could be sought for a conviction constituting a basis for deportation if that conviction "could also serve as a basis for exclusion." Katherine A. Brady, et al., Immigrant Legal Resource Center, *California Criminal Law and Immigration* § 9.13 (1995 ed.). Thus, as this guide explained, at the time the requirements for Section 212(c) eligibility were: "Lawful permanent resident with 7 years of lawful unrelinquished domicile. Not deportable under the firearms/explosives ground. Not incarcerated for five years for one or more aggravated felonies." *Id.* § 11.10.

---

cited in this section and the following section were lodged by NACDL with the Court in *St. Cyr*. Lodging to Brief of *Amici Curiae* NACDL, et al., *INS v. St. Cyr*, 533 U.S. 289 (No. 00-767) ("St. Cyr Lodging"). In light of the Court's subsequent change to the lodging rule, *see* S. Ct. R. 32.3, NACDL has assembled a file of these materials and will make it available to the Court upon request to NACDL's counsel of record.

Similarly, the 1990 edition of the California public defender's guide states that "[t]he eligibility of [LPRs] to apply for a waiver of deportation or exclusion will survive a conviction for any crime, except [weapons] possession." Katherine A. Brady & David S. Schwartz, *Public Defenders' Handbook on Immigration Law* § 1.4 (California Public Defenders Ass'n, 1988 ed.); Katherine A. Brady & David S. Schwartz, *Public Defenders' Handbook on Immigration Law* § 1.4 (California Public Defenders Ass'n 1989 2d ed.) (repeating same advice in previous year). A 1995 resource published by the Federal Defenders of San Diego, and available for use by federal defenders throughout the country, taught that Section 212(c) is "[t]he most readily available form of relief from deportation/exclusion" and that "[i]t even applies to aggravated felons, if they are sentenced to less than five years imprisonment." Larry Ainbinder, updated by Hilary Hochman, *Special Considerations in Representing the Non-Citizen Defendant* § 17.06 in *Defending a Federal Criminal Case* (Federal Defenders of San Diego, Inc., 1995 ed.).

Criminal defense guides around the country reflected the same guidance provided to and by defense counsel in California. For instance, a 1995 practice guide from the Northwest Immigrants Rights Project in Seattle offered the following description of Section 212(c) availability:

> This waiver can be used to waive all the criminal grounds of exclusion described above, and most of the criminal grounds for deportation, including drug-related

> convictions. It is important to note, however, that the 212(c) waiver will not waive a firearms conviction. Also, the 212(c) waiver is not available to an LPR who has been convicted of an aggravated felony and served 5 years or more in prison.

Robert Pauw & Jay Stansell, Northwest Immigrant Rights Project, *Immigration Consequences of Criminal Convictions* 16 (1995 ed.); Robert Pauw & Jay Stansell, Northwest Immigrant Rights Project, *Immigration Consequences of Criminal Convictions* A-13 (1992 ed.) (repeating same advice in previous year). This guide mentions no other restrictions. *See also, e.g.*, Ainbinder & Hochman, *supra*, § 17-852 ("The most readily available form of relief from deportation/exclusion is the discretionary waiver available under § 212(c) of the Act. This waiver is available to aliens who have accrued at least seven years of uninterrupted legal resident status in the United States. It even applies to aggravated felons, if they are sentenced to less than five years imprisonment.").

Indeed, the leading national treatise on the question of the immigration consequences of criminal convictions, entitled *Immigration Law and Crimes*, contained the same guidance as the myriad other sources to which criminal defense attorneys looked to for guidance so as to be able to effectively advise their clients. As long ago as 1988, this treatise taught that Section 212(c) relief from deportation could be sought where there was a comparable

ground for exclusion. The treatise then explained that for this reason firearms offenses constituted an exception to the general rule of availability of such relief. Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law & Crimes* § 7.5 (1988 ed.).

Other guides also took care to explain the statutory counterpart rule, and in doing so they reinforced the understanding of the criminal defense bar, and the advice given by the bar to our clients, that Section 212(c) relief could be sought for convictions other than firearms offenses. Thus, the 1990 Public Defenders' Handbook on Immigration Law explained that murder, rape, voluntary manslaughter, robbery, burglary, theft (grand or petit), arson, aggravated forms of assault, and forgery, were all offenses that had been consistently held to involve moral turpitude. Brady & Schwartz, *Public Defenders' Handbook on Immigration Law*, *supra*, § 4.7 (1989 2d ed.); *see also* Sarah M. Burr, Legal Aid Society, *Immigration Consequences of Criminal Convictions for Non-Citizen Clients* N-9 (1991) (murder, voluntary manslaughter, kidnapping, aggravated assault, kidnapping, rape, sexual abuse, robber, and burglary are all crimes deemed to involve moral turpitude). In contrast, the Public Defender's Handbook explains, firearms possession offenses generally do not involve moral turpitude. Brady & Schwartz, *Public Defenders' Handbook on Immigration Law*, *supra*, Table (1989 2d ed.). Therefore, "[n]on-citizens who plead to such weapons offenses [would] be rendered deportable and ineligible for 212(c) relief." *Id.* § 11.6.

In addition to providing practice guides, over the years nationally renowned experts have trained public defenders and other criminal defense attorneys around the country that Section 212(c) relief for pre-1996 convictions is widely available in deportation proceedings, with only a few specific exceptions. *See, e.g.*, Declaration of Katherine A. Brady, *supra*.

For instance, a 1994 California training seminar for federal public defenders instructed that "The waiver provided for under section 212(c) of the act is the last remedy available to many aliens convicted of serious crimes, including aggravated felonies. . . . This is an extremely important waiver. . . . [T]he waiver continues to be available even to aggravated felons, [except that] . . . the waiver is not available to aggravated felons who have served a term of imprisonment of at least five years." Jan Joseph Bejar, *Representing Aliens in Criminal Proceedings: Some Pitfalls for the Criminal Practitioner to Avoid* (1994). A 1994 orientation seminar for federal defenders in Phoenix Arizona similarly specified that aggravated felons may not eligible for waivers, but only "if the person has been convicted of an aggravated felony *and* served a term of imprisonment of at least five years." Tova Indritz, Orientation Seminar for Assistant Federal Defenders, *Representing a Non-Citizen Client in a Criminal* Case 19 (Phoenix, Arizona, Nov. 7-11, 1994) (internal quotation marks omitted) (emphasis added).

A training provided by the Santa Clara County Bar Association in 1995 explained to defense counsel

that the way to determine if a client would be eligible for relief from deportation despite a guilty plea was as follows: "Is crime one of the listed aggravated felonies? . . . *If yes*, client is deportable. If there is a firearm conviction, no waiver available. If there is no firearm conviction, then, client may be eligible for 212(c) waiver. (Client must be LPR for 7 years to be eligible to apply)." Victor Castro & Benardo Saucedo, Criminal Law Section of the Santa Clara County Bar Association, *Immigration Consequences in Criminal Law* (Oct. 18, 1995).

James A. Benzoni, an immigration expert who delivered trainings on immigration consequences of criminal convictions throughout the state of Iowa in the early 1990s, explained to defense counsel attending his courses that "§ 212(c) relief is based on the grounds of exclusion. Certain grounds of deportation do not have a corresponding ground of exclusion." James A. Benzoni, *Defending Aliens in Criminal Cases* 13 (training materials for criminal defense lawyers CLE program in Iowa from 1994-1997). Benzoni further explained that, pursuant to this principle, the sole exceptions to eligibility for relief were "anyone convicted of a firearm offense" and "[p]ersons who have served five (5) or more years of a sentence for a crime of violence." *Id.*

In sum, over the course of many years, and across the country, the same guidance was given to the criminal defense bar, and the same advice was given by competent defense counsel to their lawful permanent resident clients when those clients were weighing the immigration consequences of pleading guilty to a crime: that with the exception of certain

limited categories of offenses – viz., firearms offenses, and aggravated felonies for which a sentence of more than five years was served – Section 212(c) relief would be available in a deportation proceeding based on a conviction resulting from such a plea. Competent defense counsel did not advise their lawful permanent resident clients that in order to seek such relief they would have to travel outside the country.

C. Lawful Permanent Residents Relied On This Guidance Of Competent Defense Counsel When Pleading Guilty To Crimes.

For a noncitizen criminal defendant, the immigration implications of a criminal conviction are often far more severe than any punishment from the underlying crime. As this Court has repeatedly recognized, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Padilla*, 130 S. Ct. at 1482 (quoting *St. Cyr*, 533 U.S. at 323 (quoting 3 Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999))).[6] Thus, as this Court recently held

---

[6] *See also* Declaration of Larry Kupers ¶ 15 filed originally in *Jun Li Tam v. Reno*, No. 99-15775 (9th Cir. Feb. 22, 1999) ("I cannot state strongly enough the enormous importance that his or her immigration status has to a Legal Alien and that it has been my experience that a Legal Alien will place that status first above all other considerations, including even guilt or innocence, when faced with criminal charges conviction of which could result in deportation."); *Mojica v. Reno*, 970 F. Supp. 130, 176 (E.D.N.Y. 1997) ("Deportation to a country where a legal permanent resident of the United States has not lived since childhood; or where the immigrant has no family or means of support; or where he or she would be permanently

in *Padilla*, it expects "that counsel . . . would . . . advise themselves of the importance of [Section 212(c)]," so as to be able to competently advise their clients. *Id.* at 1483 (*citing St. Cyr*, 533 U.S. at 523 n.50).

With respect to a lawful permanent resident's receptivity to a plea, it has been *amici*'s experience that legal aliens are far more likely than a citizen to plead guilty to an offense when doing so reduces the risk of what this Court has "long recognized" as a "particularly severe 'penalty.'" *Id.* at 1481 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)). *See* Declaration of Cristina Arguedas ¶ 9 filed originally in *Jun Li Tam v. Reno*, No. 99-15775 (9th Cir. Feb. 22, 1999) ("[I]t has been my experience that Legal Alien clients are incomparably more risk-averse as a class of criminal defendants than citizen defendants. That is to say . . . . Legal Alien clients will not jeopardize their immigration status in the United States by going to trial when accepting a plea bargain gives them even a modest advantage for the preservation of their immigration status.").

For many criminal defense lawyers, therefore, the "first concern is to determine what kind of plea offer will help to preserve [their] client's legal status in the United States." *Id.* Prior to 1996, this frequently involved pleading to offenses that would preserve a client's right to apply for a Section 212(c) waiver. *St.*

---

separated from a spouse, children and other loved ones, is surely a consequence of serious proportions that any immigrant would want to consider in entering a plea."), *motion to withdraw appeal granted sub nom. Yesil v. Reno*, 175 F.3d 287 (2d Cir. 1999).

Cyr, 533 U.S. at 321. As a result, the precise guidance in practice aides and training programs about which crimes preserved Section 212(c) eligibility played a critical role in shaping defendants' pleas. *See, e.g.*, Katherine Brady, Immigrant Legal Resource Center, *Public Defenders' Handbook on Immigration Law: Update* (Update Jan. 1989) ("For immigration purposes, non-citizens should never plead guilty to possession of a firearm or destructive device. Recall that persons who are deportable under this ground are not eligible for '212(c)' relief."); Indritz, *supra*, at 2 (instructing attorneys not to "preclude potential forms of immigration relief for which the client might otherwise be eligible"); Affidavit of Dennis R. Murphy ¶ 7 filed with amicus curiae brief of the National Association of Criminal Defense Lawyers & the National Legal Aid and Defender Association before the Attorney General in *Matter of Soriano*, Int. Dec. 3289 on Apr. 30, 1998 ("[O]ur lawful permanent resident clients have relied on information that we have provided regarding their statutory right to apply for relief from deportation when pleading guilty to a criminal charge that made them deportable from the United States, or when choosing not to pursue an appeal.").

And as this Court recently recognized in *Padilla*, "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." 130 S. Ct. at 1482; *cf. Glover v. United States*, 531 U.S. 198 (2001) (holding that counsel has a Sixth Amendment obligation to mitigate punishment). Indeed, the

Court observed that "authorities of every stripe-including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications-universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients." *Padilla*, 130 S. Ct. at 1482 (quoting Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12-14); *see also ABA Standards for Criminal Justice, Pleas of Guilty* (3d ed.), Standard 14-3.2(f), commentary at 27 (1999) ("it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction").

These obligations of counsel were no less clear prior to 1996. At that time, the Standards for Criminal Justice of the American Bar Association provided that, where it is apparent that a defendant may face deportation as a result of a conviction, counsel "should fully advise the defendant of these consequences." *ABA Standards for Criminal Justice, Pleas of Guilty* (2d ed.), Standard 14-3.2, commentary at 75 (1982). In addition, contemporaneous Performance Guidelines of the National Legal Aid and Defender Association recognized that it is defense counsel's duty to "be fully aware of, and make sure that the client is fully aware of . . . consequences of conviction such as deportation," and to explain to the client the potential consequences of any plea agreement. *NLADA Performance Guidelines for Criminal Defense Representation*, Guidelines 6.2(a)(3) & 6.3(a), at 77 (1994).

Lawful permanent resident criminal defendants pleading guilty relied on the understanding of Section 212(c) eligibility described in the criminal defense practice aides and training programs discussed herein. *See* Part I, *supra*. This guidance reasonably advised among other things that a lawful permanent resident who pleaded guilty to a crime that would be a basis for an exclusion proceeding were the individual seeking admission to the United States, would also be eligible to seek Section 212(c) relief in a deportation proceeding. Such crimes included crimes of violence, such as the crime to which Petitioner pleaded guilty, because these offenses were understood to involve moral turpitude. The existing guidance did not state that criminal defense attorneys should advise their lawful permanent resident clients pleading guilty that in order to seek such relief they would have to leave the United States, and competent counsel did not so advise these clients. Criminal defendants in petitioner's position therefore would have reasonably expected to be able to seek such relief in a deportation proceeding, without regard for whether a guilty plea was followed by travel outside of the United States, and conversely would not have had reason to think that the only way to obtain relief would be to leave the country (thus either triggering exclusion proceedings, or permitting a Section 212(c) waiver of inadmissibility *nunc pro tunc* in subsequent deportation proceedings).

Indeed, if contrary to the manner in which lawful permanent resident criminal defendants were in fact advised, they had been advised that they would be

unequivocally barred from seeking Section 212(c) in all but the narrowest of cases (as the BIA's 2005 decisions in *Blake* and *Brieva-Perez* would have it), then these lawful permanent resident defendants may have rejected the plea offer pursuant to which they were convicted. Before agreeing to plead guilty, many specifically asked their defense lawyers what chance they would have of being granted relief from deportation. As this Court noted in *St. Cyr*, that outcome was far from remote: statistics indicated that "51.5% of the applications for which a final decision was reached between 1989 and 1995 were granted." *St. Cyr*, 533 U.S. at 296 & n.5. Defendants then weighed any immigration consequences just as they weighed other aspects of a plea offer, such as the probable sentence, the availability of parole, and the overall disruption that the plea would cause to themselves and their families.[7]

Finally, it is worth noting that the lawful permanent residents who tended to rely the most on the possibility of a waiver of deportation were precisely those who had the strongest equities, *e.g.*,

---

[7] As the Court recognized in *Padilla*, informed consideration of the many consequences flowing from a plea agreement benefits both the State and the defendant, and an understanding of those consequences may allow counsel to "plea bargain creatively with the prosecutor" so as to reduce the severity of those consequences. *Padilla*, 130 S. Ct. at 1486; *see also* Jenny Roberts, *Proving Prejudice, Post-*Padilla, 54 How. L.J. 693, 697 (2011) (noting that information as to immigration consequences "may well factor into defense counsel's negotiation or sentencing advocacy," allowing the defendant to obtain "a different or better plea bargain").

individuals who had lived virtually their entire lives in the United States, whose family members were all in the United States, or who had served in the U.S. military. Even if such a permanent resident had no prior criminal record and the evidence of guilt was weak, he or she might have pleaded guilty based on advice that deportation would not be automatic and that there would be a good chance of having a Section 212(c) application granted based on those very same factors – family, job, residence, etc. – that also made it more likely that defense counsel would be able to negotiate a plea with little or no jail time. Indeed, the lack of a prior criminal record could make a plea agreement more likely because in that circumstance the defendant would not face recidivist enhancements to any sentence imposed. The BIA's rule in *Blake* and *Brieva-Perez* would add an additional layer of irony to the plight of those affected by it: these are the lawful permanent resident defendants who, since their guilty pleas, have remained in the country and therefore have only further reinforced their strong ties here over the course of years.

II. THE RULE IN *BLAKE* AND *BRIEVA-PEREZ* HAS THE IMPERMISSIBLE RETROACTIVE EFFECT THAT *ST. CYR* HELD CONGRESS DID NOT INTEND.

The BIA's decisions in *Blake* and *Brieva-Perez* regarding the availability of Section 212(c) relief have the effect of precluding any possibility of such relief for a substantial subset of the lawful permanent residents at issue in *St. Cyr*. Thus, although the government claims that its interpretation is consistent with *St. Cyr*, in fact this

interpretation has the effect of undermining that decision by imposing the very retroactive burdens that *St. Cyr* said were not intended by Congress and are impermissible.

In *St. Cyr*, this Court held that it would have an unintended retroactive effect to eliminate Section 212(c) for defendants previously convicted by guilty plea. In reaching that determination, the Court emphasized that eliminating Section 212(c) would upend the reasonable expectations of lawful permanent residents about the immigration consequences of their guilty pleas, based on the advice of their counsel, and would unfairly deprive them of the benefit of the bargain they struck by pleading guilty in reliance on that advice:

> Relying on settled practice, the advice of counsel, and perhaps even assurances in open court that the entry of the plea would not foreclose Section 212(c) relief, a great number of defendants . . . agreed to plead guilty. Now that prosecutors have received the benefit of these plea agreements, agreements that were likely facilitated by the aliens' belief in their continued eligibility for § 212(c) relief, it would surely be contrary to 'familiar considerations of fair notice, reasonable reliance, and settled expectations,' *Landgraf* [*v. USI Film Prods.*, 511 U.S. 244, 270 (1994)], to hold that . . . subsequent restrictions deprive them of any possibility of such relief.

St. Cyr, 533 U.S. at 323-24 (footnote omitted).

So too here. Prior to 1996, lawful permanent residents were advised by counsel that they could seek discretionary relief under Section 212(c) if they were later subjected to exclusion or deportation proceedings based on their guilty plea. And as explained above, lawful permanent resident criminal defendants at that time did not just rely on *some* conception of Section 212(c) relief. Instead, they were specifically counseled that Section 212(c) would be available for a broad range of crimes, with limited exceptions not applicable to Petitioner or others who pleaded guilty to crimes such as his. Yet the government's novel interpretation of the statutory counterpart rule now eliminates the possibility of such relief for all but a sliver of the class that had been covered by *St. Cyr*.

To take Mr. Judulang as an example, if he had been the respondent in *St. Cyr*, *amici* respectfully submit that this Court would have found that depriving him of a Section 212(c) remedy would have had an unintended retroactive effect. His guilty plea to voluntary manslaughter would have been treated as one falling within the scope of the statutory counterpart rule in effect when he pleaded guilty in 1988 (and which continued in effect until 2005) – because it involved moral turpitude – making him eligible for Section 212(c) relief if subjected to exclusion or deportation proceedings based on that conviction. *See, e.g.*, Brady & Schwartz, *Public Defenders' Handbook on Immigration Law*, *supra*, § 1.4 (1988) ("The eligibility of [LPRs] to apply for a

waiver of deportation or exclusion will survive a conviction for any crime, except [weapons] possession."); Brady & Schwartz, *Public Defenders' Handbook on Immigration Law*, *supra*, § 1.4 (1989 2d ed.) (same). Indeed, the BIA's new reasoning would have precluded relief for many individuals previously found by the BIA to be eligible for relief from deportation based on application of the statutory counterpart rule to their crime of violence convictions. *See, e.g., Matter of Reyes Manzueta*, 2003 WL 23269892 (BIA Dec. 1, 2003) (dismissing agency's appeal of decision granting 212(c) relief to an individual convicted of first degree manslaughter and holding that, although "the ground of deportation and exclusion" are not "identical in wording," the offense "is considered to be a crime involving moral turpitude" under Section 212(a)(2)(A)(i)(I)); *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. at 590-91 (finding that an individual who had been convicted of murder, an aggravated felony, was eligible for relief because he was deportable under a provision analogous to the exclusion provision for crimes involving moral turpitude).

Yet under the government's current interpretation of the rule, Petitioner and others like him are no longer entitled to Section 212(c) relief despite having pleaded guilty under a legal regime that unquestionably made that relief available, and under which defendants pleading guilty to crimes of violence such as his were routinely advised by competent defense counsel that this would be the case.

Thus, all of the considerations this Court considered in *St. Cyr* are present here. Then, as now, "[t]here can be little doubt that . . . alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *St. Cyr*, 533 U.S. at 322. Then, as now, "preserving the possibility of [Section 212(c)] relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And then, as now, it would have an "obvious and severe retroactive effect" to eliminate *ex post* the entitlement to Section 212(c) relief, especially because LPRs were frequently successful in obtaining waivers of deportation under the provision. *Id.* at 325, 296 n.5.

St. Cyr resolved whether Congress intended its repeal of Section 212(c) to apply retroactively. Having determined that Congress did not so intend, this Court should now hold that the BIA may not achieve an equivalent result to what *St. Cyr* forbade through agency decision. An "agency's power to promulgate legislative regulations is limited to the authority delegated by Congress," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Nor may an agency change course and impose retroactive consequences where the "ill effect of the retroactive application of a new standard . . . [exceeds] the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). In particular, "an administrative agency may not apply a new rule

retroactively when to do so would unduly intrude upon reasonable reliance interests." *Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 n.12 (1984).

Here, there is no argument that granting Section 212(c) relief – where the equities so warrant – could be a result "contrary to statutory design" given that this Court has already held that Congress intended to maintain Section 212(c)'s availability for lawful permanent residents convicted before 1996 where that relief was previously available to them. Nor do the other factors that courts typically consider in a *Chenery* analysis support the government's position. *Amici* will not repeat the analysis set forth in Petitioner's brief, Petitioner's Brief at 31-38, but we place special emphasis on the reliance inquiry that *Chenery* requires, and *Heckler* emphasizes. As *St. Cyr* recognized, a plea agreement is a "quid pro quo," that a defendant enters into in part on the basis of the advice of his counsel. 533 U.S. at 322-24. For all the reasons stated above, the government's interpretation in *Blake* and *Brieva-Perez* upends that deal by changing the consequences of a lawful permanent resident's guilty plea. The Court in *St. Cyr* rejected the idea that Congress implicitly intended to change those consequences, and there is no basis for the BIA to retroactively impose such a change here.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

Iris E. Bennett*
Matthew S. Hellman
Sean J. Hartigan
James C. Cox
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
ibennett@jenner.com

Joshua L. Dratel
Co-Chair, Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
JOSHUA L. DRATEL, P.C.
2 Wall Street, Third Floor
New York, NY 10005
(212) 732-0707

Edwin A. Burnette
Vice President, Defender
Legal Services
NATIONAL LEGAL AID & DEFENDER
ASSOCIATION
1140 Connecticut Avenue, NW
Suite 900
Washington, DC 20036
(202) 452-0620

* Counsel of Record

Attorneys for Amici Curiae

AMICUS CURIAE BRIEF

BRIEFS

No. 10-694

IN THE

Supreme Court of the United States

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL IMMIGRANT JUSTICE CENTER AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

CHARLES ROTH
NATIONAL IMMIGRANT JUSTICE CENTER
208 South LaSalle Street
Suite 1818
Chicago, IL 60601
(312) 660-1370

MATTHEW L. GUADAGNO
AMERICAN IMMIGRATION LAWYERS ASSOCIATION
1331 G Street, NW,
Suite 300
Washington, DC 20005
(202) 507-7600

BRIAN J. MURRAY
Counsel of Record
JONES DAY
77 West Wacker Drive
Suite 3500
Chicago, IL 60601-1692
(312) 782-3939
bjmurray@jonesday.com

ERIK J. CLARK
AMBER L. MERL
JONES DAY
325 John H. McConnell Blvd.,
Suite 600
Columbus, OH 43215
(614) 469-3939

Counsel for Amici Curiae

JULY 12, 2011

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE NEW BLAKE/BRIEVA RULE AFFECTS LAWFUL PERMANENT RESIDENTS WITH DECADES OF RESIDENCE, STRONG TIES TO THE UNITED STATES, AND PROVEN RECORDS OF REHABILITATION 5

A. The Blake/Brieva rule categorically precludes noncitizens from seeking § 212(c) waivers, no matter the noncitizen's dedication to and integration in the United States 5

B. The Blake/Brieva rule categorically precludes noncitizens from seeking § 212(c) waivers, no matter the noncitizen's record of rehabilitation 7

C. The Blake/Brieva rule categorically precludes noncitizens from seeking § 212(c) waivers, and changes the rules as they were understood at the time of many noncitizens' convictions 10

TABLE OF CONTENTS
(continued)

Page

II. THERE IS NO REASON TO BELIEVE THAT CONGRESS ACTUALLY WISHED TO TREAT NONCITIZENS WHO TRAVEL ABROAD MORE FAVORABLY THAN NONCITIZENS WHOSE STRONG CONNECTIONS TO THE UNITED STATES KEEP THEM FROM EVER LEAVING THIS COUNTRY 12

A. Noncitizens with the strongest ties to this country are often less likely to travel abroad 15

B. Congress routinely passes laws granting more rights and favorable treatment to noncitizens with the most time in and connections to the United States 16

C. Limiting § 212(c) relief to noncitizens who travel abroad results in permanent exile for noncitizens who often have the greatest ties to the United States 18

D. Exclusion proceedings provide no unique benefit to the Agency that explains the distinctive focus on foreign travel 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Abebe v. Mukasey,
554 F.3d 1203 (9th Cir. 2009) (en banc) 13, 21

Blake v. Carbone,
489 F.3d 88 (2d Cir. 2007) 3, 13, 14, 15

Francis v. INS,
532 F.2d 268 (2d Cir. 1976) 13, 15, 19, 20

Frederick v. Holder,
No. 09-2607, 2011 WL 1642811
(7th Cir. May 3, 2011)..... 9, 19

Hoang v. Hoang,
No. 08-7470 (9th Cir. Aug. 18, 2009) 8

INS v. Phinpathya,
464 U.S. 183 (1984)..... 17, 18

INS v. St. Cyr,
533 U.S. 289 (2001)..... 3, 12

Johnson v. Eisentrager,
339 U.S. 763 (1950)..... 16

Khodja v. Holder,
No. 11-2346 (7th Cir.) 11, 12

Lovan v. Holder,
574 F.3d 990 (8th Cir. 2009) 22

Matter of Bennett,
A13-006-447 (BIA Apr. 19, 2005) 11

Matter of Birkett,
A36-868-892, 2006 WL 2183538
(BIA June 26, 2006)..... 6, 7, 19, 23

TABLE OF AUTHORITIES
(continued)

Page(s)

Matter of Blake,
23 I&N Dec. 722 (BIA 2005) 2, 4

Matter of Burbano,
20 I&N Dec. 872 (BIA 1994) 23

Matter of L-,
1 I&N Dec. 1 (BIA, A.G. 1940) 20

Matter of Manzueta,
A93-022-672, 2003 WL 23269892
(BIA Dec. 1, 2003) 20

Matter of Meza,
20 I&N Dec. 257 (BIA 1991) 14

Matter of Rodriguez-Cortes,
20 I&N Dec. 587 (BIA 1992) 14, 21

Requena-Rodriguez v. Pasquarell,
190 F.3d 299 (5th Cir. 1999) 13

Rubio v. Gonzales,
182 F. App'x 925 (11th Cir. 2006)
(per curiam) 5, 6

STATUTES AND REGULATIONS

Immigration and Nationality Act, 8 U.S.C.

§ 1101(a)(13) 17

§ 1182(a) ..... *passim*

§ 1182(c) ..... *passim*

§ 1182(h) 17

§ 1229b(a) 16

§ 1229b(b) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

8 U.S.C. § 1446(a) 22

8 C.F.R. § 1212.3(a) 22

8 C.F.R. § 1212.3(e) 22

OTHER AUTHORITIES

Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-548, 3009-589 (1996) 3

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, Title I, 111 Stat. 2440, 2448 (1997) 22

Application for the Exercise of Discretion Under 212(c) of the Immigration and Nationality Act, 56 Fed. Reg. 50,033 (Oct. 3, 1991) 21, 22

The National Immigrant Justice Center ("NIJC") and the American Immigration Lawyers Association ("AILA") respectfully submit this brief as *amici curiae* in support of petitioner.[1]

INTEREST OF *AMICI CURIAE*

The NIJC and AILA are two immigration-focused organizations with substantial interest in the Court's resolution of this case.

Heartland Alliance's National Immigrant Justice Center ("NIJC") is a Chicago-based non-profit organization, accredited since 1980 by the Board of Immigration Appeals ("BIA") to provide immigration assistance. NIJC works to ensure that the laws and policies affecting noncitizens in the United States are applied in an even-handed and humane manner. NIJC provides free and low-cost legal services to approximately 8,000 noncitizens per year, and represents hundreds of noncitizens who encounter serious immigration obstacles as a result of entering guilty pleas in state criminal court without realizing the immigration consequences. For nearly ten years, NIJC has offered no-cost training and consultation to criminal defense attorneys representing noncitizens, to advise them on the immigration consequences resulting for their clients from various potential dispositions in criminal cases. NIJC also publishes manuals designed for criminal defense attorneys who defend noncitizens in criminal proceedings. Because

---

[1] All parties have consented in writing to the filing of this *amici curiae* brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

of the severity of the immigration consequences for noncitizens, NIJC has a strong interest in ensuring that criminal convictions have consequences which are reasonable, predictable, and publicly known.

AILA is a national association with over 11,000 members throughout the United States, including lawyers and law professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

As two preeminent organizations in the immigration litigation field, NIJC and AILA share a significant interest in the availability of § 212(c) waivers to all removable noncitizens who would qualify for them under any ground for exclusion in § 212 of the Immigration and Nationality Act, 8 U.S.C. § 1182(a).

SUMMARY OF ARGUMENT

The BIA's about-face in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), and *Matter of Brieva-Perez*, 23 I&N Dec. 766 (BIA 2005), upsets settled expectations for numerous noncitizens with meaningful ties to this country, who have been convicted of criminal offenses, and puts in real jeopardy their ability to remain here—with potentially catastrophic results.

For decades the BIA analyzed eligibility for a waiver pursuant to former Immigration and Nationality Act ("INA") § 212(c), 8 U.S.C. § 1182(c) (repealed 1996), under the statutory counterpart

analysis the same way for *both* deportable *and* excludable noncitizens, made so by commission of a crime. *Blake v. Carbone*, 489 F.3d 88, 93-94 (2d Cir. 2007) ("*Blake II*"). Both could apply for such a waiver if the conduct that rendered them either deportable or excludable fell under any waiveable ground for exclusion in § 212 of the INA, 8 U.S.C. § 1182(a). *Blake II*, 489 F.3d at 95.

In 1996, Congress repealed § 212(c) relief. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-548, 3009-589 (1996) ("IIRIRA"). But in *INS v. St. Cyr*, 533 U.S. 289, 323-24 (2001), this Court made clear that § 212(c) relief would still be available for otherwise-eligible noncitizens with convictions prior to the effective date of the repeal.

In 2005, however, in *Blake/Brieva*, the BIA changed the rules to focus the statutory counterpart inquiry on formalities rather than the actual offense of conviction. This leads to the following irrational distinction for three categories of noncitizens with the same conviction:

1. A noncitizen who has traveled abroad, and on return is subject to *exclusion*, can still qualify for a § 212(c) waiver if the conviction triggers inadmissibility under INA § 212.

2. A noncitizen who has traveled abroad after conviction, is admitted (accidentally) without examination of the conviction, and is later subject to *deportation* based on that conviction, is likewise eligible for a § 212(c) waiver if the conviction triggered inadmissibility under INA § 212.

3. But a noncitizen who has not traveled abroad after conviction, and is subject to deportation based on that conviction, is not eligible for a § 212(c) waiver

even if the conviction would render him excludable. Instead, he is eligible for that waiver *if and only if* the statutory ground for *deportability* made applicable by the conviction is formalistically the same as a § 212 ground of inadmissibility. *Blake*, 23 I&N Dec. 722. That is, the analysis for these noncitizens shifts from one of whether conduct underlying a conviction meets a § 212(c) ground, to one of whether the statutory ground for their deportability looks the same as a § 212(c) ground. It is not enough that the conviction would on its facts satisfy both; the two statutory definitions must look the same, only for this category of noncitizens.

This arbitrary change amounts to a categorical denial of § 212(c) waiver relief for countless noncitizens who have lived in, worked in, and contributed positively to this country for most of their lives. That such a denial should turn not on how any given conviction makes a noncitizen better or worse suited to continue living here, but solely on whether that person traveled abroad after the conviction, is absurd. Worse, it treats noncitizens who travel abroad and return to the country more favorably than those who never travel abroad. That runs contrary to a general immigration-law policy that affords *more* rights to noncitizens who remain in the country uninterrupted.

The Court should reverse the decision below, putting an end to the *Blake/Brieva* rule's irrational denial of § 212(c) waivers.

ARGUMENT

I. THE NEW *BLAKE/BRIEVA* RULE AFFECTS LAWFUL PERMANENT RESIDENTS WITH DECADES OF RESIDENCE, STRONG TIES TO THE UNITED STATES, AND PROVEN RECORDS OF REHABILITATION.

The BIA's avulsive change in the law in *Blake/Brieva* portends catastrophic consequences for real people—noncitizens who are living the American dream with their families in communities across this nation. And not because of the seriousness of their crimes, or anything else that could conceivably be relevant. But simply because they stayed here, contributing to their communities and raising their families, instead of traveling abroad after committing their crimes.

The examples below are precisely the types of stories that deserve an individualized weighing of the equities before granting or denying a § 212(c) waiver. Instead, the *Blake/Brieva* rule categorically precludes these people from even seeking § 212(c) waivers, no matter how deserving they may be.

A. The *Blake/Brieva* rule categorically precludes noncitizens from seeking § 212(c) waivers, no matter the noncitizen's dedication to and integration in the United States.

Antonio Rubio came to the United States at a very early age, perhaps as young as two years old. *Rubio v. Gonzales*, 182 F. App'x 925 (11th Cir. 2006) (per

curiam).[2] Mr. Rubio obtained temporary resident status in 1988 and lawful permanent resident status in 1990. *Rubio*, 182 F. App'x at 926. He has never returned to his native country of El Salvador. Instead, he has built a life here with his wife and three children, who are United States citizens. Brief for Petitioner at Statement of Facts, *Rubio*, 182 F. App'x 925 (Nos. 05-14759 & 05-15973). In fact, Mr. Rubio is so dedicated to this country that he served in the United States Naval Reserves following September 11th. *Id.*

Long before all of that, Mr. Rubio pled guilty to burglary for his involvement as the lookout during a burglary when he was 17 years old. *Rubio*, 182 F. App'x at 926; Brief for Petitioner at Statement of Facts, *Rubio supra*. He was sentenced to 5 years confinement, to be served on probation after completing 90-120 days in "Boot Camp." *Rubio*, 182 F. App'x at 926. Ten years later—after his marriage, the birth of his children, and his military service to this country—Mr. Rubio was found ineligible for § 212(c) relief based on the *Blake/Brieva* rule. *Rubio*, 182 F. App'x at 927. Though Mr. Rubio had not been to El Salvador since he was around two years old, he was ordered to leave his home and his life in the United States and to return to El Salvador.

Consider also Clete Noel Birkett, another noncitizen who has not traveled abroad, and as a consequence, is categorically ineligible for § 212(c) relief. *Matter of Birkett*, A36-868-892, 2006 WL 2183538 (BIA June 26, 2006). Mr. Birkett is a citizen

---

[2] Case files for exemplars in this brief are on file with counsel for *amici curiae* and, where indicated by citation, available on Westlaw or Lexis.

of Trinidad and Tobago and a lawful permanent resident since 1981. Oral Decision of the Immigration Judge at 5, *Matter of Birkett*, A36-868-892 (Feb. 21, 2006). His wife is a United States citizen and Mr. Birkett has raised his wife's two daughters since they were young children. *Id.* Mr. Birkett cares for his wife, who suffers from sickle cell anemia and has suffered strokes and a heart attack in the past. *Id.* Thus, Mr. Birkett's family, all United States citizens, depends on him.

Mr. Birkett was placed into deportation proceedings for two past convictions: one for attempted criminal sale of a controlled substance in 1988 and another for robbery in 1993. *Matter of Birkett*, A36-868-892, 2006 WL 2183538. The immigration judge found that under *Blake/Brieva*, Mr. Birkett could not apply for a § 212(c) waiver because his convictions lacked a statutory counterpart under § 212. *Id.* The immigration judge stated, however, that *if* Mr. Birkett were eligible for § 212(c) relief, the judge *would grant the application* because Mr. Birkett demonstrated remorse and rehabilitation and posed a small risk of future problems. *Id.* As a result, but for Mr. Birkett's failure to travel abroad, Mr. Birkett could have applied for and received a § 212(c) waiver and been given permission to remain in this country to care for his family.

B. The *Blake/Brieva* rule categorically precludes noncitizens from seeking § 212(c) waivers, no matter the noncitizen's record of rehabilitation.

Lan Tung Hoang was involved in a bar fight twenty years ago, served his time, and now has a

loving family, home, and successful career. Mr. Hoang came to this country in 1987 as a political refugee from Vietnam. Brief for Petitioner at 10, *Hoang v. Hoang*, No. 08-7470 (9th Cir. Aug. 18, 2009). Since arriving in the United States, Mr. Hoang has never left. *Id.* Mr. Hoang's family here includes his wife (a lawful permanent resident) and four teenage children (United States citizens), as well as six siblings who are all citizens or lawful permanent residents. *Id.* at 10-11. The Hoangs own their family home. *Id.* at 11. Mr. Hoang's career at Trim Systems, an auto parts manufacturing company, has spanned 10 years now—he was first promoted to production leader and then supervisor. *Id.* His hard work and success have been acknowledged by company awards. *Id.*

Twenty years ago, in 1991, Mr. Hoang was convicted of assault with a deadly weapon following a bar fight. *Id.* at 8. The judge sentenced Mr. Hoang to 15 months in prison, though he served less than his full sentence. *Id.* at 12. Fifteen years later, after he applied for naturalization, Mr. Hoang was placed in removal proceedings and charged with both an aggravated felony and a crime involving moral turpitude based on his 1991 conviction. *Id.* at 9. The BIA found Mr. Hoang ineligible to apply for § 212(c) relief based on the *Blake/Brieva* rule. *Id.* at 12.

Consider also Michael Frederick, a German citizen, who is another example of a noncitizen who served prison time twenty years ago, and since then has raised a family, worked hard and earned company recognition, joined a church, and become known throughout his community as someone who is always willing to lend a helping hand. Mr. Frederick has lived in the United States for decades and, for at

least the last two decades, has never left because everything he loves is in this country. Brief for Petitioner at 34-35, *Frederick v. Holder*, No. 09-2607, 2011 WL 1642811 (7th Cir. May 3, 2011). Mr. Frederick has no known family in Germany, but two of his siblings are United States citizens and one sibling is a lawful permanent resident. *Id.* at 10. His wife is a United States citizen as well, as are her seven children whom Mr. Frederick raised and supported. *Id.* at 10-11. Mr. Frederick converted to Catholicism twenty years ago while in prison. Since then, he has lived a model, faith-filled life. He is known in his community as someone who will help others, whether financially, spiritually, or emotionally, lending a hand with projects or repairs, or even just giving someone a ride. *Id.* at 11. Mr. Frederick regularly checks on elderly friends and neighbors and helps them with their homes. He has worked since his prison release in 1991, and since 2000 has been employed and promoted at All-Service Contracting. *Id.* Mr. Frederick owns two homes, a cottage, and a boat. *Id.* at 35.

In 1990 Mr. Frederick pled guilty to two separate counts of aggravated criminal sexual abuse and received two four-year concurrent sentences. *Id.* at 7. He served his prison term from April 1990 to September 1991, *id.*, significantly less than the five years of actual imprisonment that would have barred eligibility to a § 212(c) waiver. While in prison, he earned his associate's degree in liberal arts and participated in Alcoholics Anonymous. *Id.* at 11. Despite having been deportable at the time of his offense, Mr. Frederick was not placed in removal proceedings until 2007, 16 years after his release from prison. *Id.* at 7-8. The BIA then found Mr.

Frederick ineligible for § 212(c) relief under the *Blake/Brieva* rule. *Id.* at 9.

C. The *Blake/Brieva* rule categorically precludes noncitizens from seeking § 212(c) waivers, and changes the rules as they were understood at the time of many noncitizens' convictions.

Ronald Bennett is a noncitizen who, following the advice of his attorney, pled guilty almost twenty years ago in part to avoid deportation. Mr. Bennett is a 75-year-old from the United Kingdom who was admitted to the United States as a lawful permanent resident in 1962. Statement of Eligibility for Relief at 3, *Ronald Bennett*, A013-006-447 (Immigration Court, Mar. 20, 2011). Since his admission to this country, Mr. Bennett has never left. He has no reason to travel to England; he has no surviving relatives there, and his son and grandchildren live in his Washington community. Ltr. Seeking Prosecutorial Discretion at 4 (Apr. 5, 2011). Mr. Bennett has an unwavering dedication to his community underscored by his long history of service and leadership. He served eight years on the Salvation Army Advisory Board (including one term as chairman), eight years on the Port Angeles City Planning Commission (including one term as chairman), 22 years in the Port Angeles Kiwanis Club (including one term as president), and 22 years in the Port Angeles Chamber of Commerce (including eight years on the Board of Directors). *Id.*

In 1992, Mr. Bennett pled guilty to the offense of child molestation and was sentenced to six months work release, with probation and a treatment program. Resp. Statement of Eligibility for Relief at

3. He completed both without issue and received outstanding recommendations from his probation officer and treatment provider. *Id.* At the time of his plea, Mr. Bennett's attorney advised him that pleading guilty would protect him from deportation, in part, because he would be eligible for a § 212(c) waiver. *Id.* At his removal hearing the immigration judge agreed, granting § 212(c) relief. Order at 1, *Ronald Bennett*, A13-006-447 (Immigration Court Mar. 31, 2011). But the BIA reversed, holding Mr. Bennett ineligible for the relief under the new *Blake/Brieva* rule. Order at 2, *Matter of Bennett*, A13-006-447 (BIA Apr. 19, 2005).

Finally, consider Nourredine Khodja, another classic example of a noncitizen who unfairly lost the potential of a § 212(c) waiver, despite a settled understanding that he was eligible for such a waiver. Mr. Khodja was convicted of armed violence and found guilty of aggravated battery in 1990. *Khodja v. Holder*, No. 11-2346 (7th Cir.) (decision pending); *see also* Brief for Respondent at 24 n.4, *Khodja supra* (finding that Khodja was mentally ill at the time).[3] At the time of his conviction, state court judges were authorized to issue a Judicial Recommendation Against Deportation ("JRAD"), which would protect an individual from removal. At Mr. Khodja's JRAD hearing, an INS attorney argued that the state court should deny the JRAD request because Mr. Khodja could always request a § 212(c) waiver before an immigration judge. Brief for Respondent at 7-8,

---

[3] Mr. Khodja's case is currently pending at the Seventh Circuit and, although his brief is publically available to review, the court does not permit the brief to be copied. Consequently, this brief is not on file with counsel for *amici curiae*.

Khodja supra. The state court denied the JRAD request. *Id.* at 8. Fourteen years later, during Mr. Khodja's removal proceeding, the *same INS attorney* sought removal, arguing that Mr. Khodja was ineligible for § 212(c) relief. *Id.* at 24 n.4. Mr. Khodja's § 212(c) application was denied. *Id.* at 12. This is plainly unfair for Mr. Khodja, but also for any other noncitizen previously eligible for § 212(c) relief, and later denied the chance to apply for a § 212(c) waiver.

These stories and others highlight real lives that have been and will continue to be devastated by the *Blake/Brieva* rule. Prior to that change, Mr. Rubio, Mr. Birkett, Mr. Hoang, Mr. Frederick, Mr. Bennett, and Mr. Khodja could all have applied for § 212(c) waivers. And given the equities of their stories, it is likely that those waivers would have been granted, preventing them from having to leave their homes in this country. *See St. Cyr*, 533 U.S. at 296 n.5 (noting that about 50% of § 212(c) waiver applications are granted). But now, if the new *Blake/Brieva* rule remains law, these men and all their positive contributions will be lost, because (with no further fault of their own) they are categorically denied the possibility of a § 212(c) waiver.

II. THERE IS NO REASON TO BELIEVE THAT CONGRESS ACTUALLY WISHED TO TREAT NONCITIZENS WHO TRAVEL ABROAD MORE FAVORABLY THAN NONCITIZENS WHOSE STRONG CONNECTIONS TO THE UNITED STATES KEEP THEM FROM EVER LEAVING THIS COUNTRY.

One of the critical problems underscored by these cases is that under the BIA's new approach to the

statutory counterpart analysis in *Blake/Brieva*, noncitizens who have traveled abroad are treated better than those who have not. Courts have noted this irrational distinction in striking § 212(c) waiver limitations on Equal Protection grounds. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976); *Blake II*, 489, F.3d at 104. But regardless whether this distinction renders the *Blake/Brieva* rule constitutionally infirm, a more fundamental point remains: It simply makes no sense, and goes against the current of countless other immigration laws, to treat noncitizens who have never left the country—and often have the most ties to the United States—*worse* than noncitizens who have left. This is not what Congress intended, and should not be the law. As the *Francis* court stated, "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time." *See Francis*, 532 F.2d at 273.

To be sure, some courts have suggested that Congress *could* have rationally decided to reward travel abroad. *See, e.g., Abebe v. Mukasey*, 554 F.3d 1203, 1206 (9th Cir. 2009) (en banc); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 309 (5th Cir. 1999). But there is no evidence—nor has any court suggested—that Congress *did actually intend* to reward travel abroad.[4] *See Francis*, 532 F.2d at 273

---

[4] Indeed, the *Blake/Brieva* rule is stranger still. It does not hold that Congress might have wished to condition § 212(c) eligibility on travel abroad generally, but only that it wished to do so for certain classes of aggravated felons. The *Blake/Brieva* rule impacts only certain categories of aggravated felony convictions;

("The government has failed to suggest any reason why this petitioner's failure to travel abroad following his conviction should be a crucial factor in determining whether he may be permitted to remain in this country."). In fact, the far more common thread in immigration law is the contrary: Congress has repeatedly chosen to provide *more* rights to noncitizens who have remained in this country for longer periods of time. Nor is there any practical benefit to a regime that treats noncitizens who travel abroad more favorably than those who remain in the country. The *Blake/Brieva* rule turns this logic on its head, making noncitizens with the greatest ties to this country—ties so strong, in fact, that they have never left—the only noncitizens who are categorically denied the benefit of the § 212(c) waiver.

That rule is not what Congress intended. Rather, as the Second Circuit correctly held in *Blake II*, what

---

at the moment, only crimes of violence and sexual abuse of a minor. Other classes of deportable noncitizens—like drug traffickers and murderers—remain eligible for § 212(c) regardless of travel abroad, because the Board has found a "comparable ground" amongst the grounds of excludability. *See Matter of Rodriguez-Cortes*, 20 I&N Dec. 587, 590-91 (BIA 1992) (murder); *Matter of A-A-*, 20 I&N Dec. 492, 500-01 (BIA 1992) (murder); *Matter of Meza*, 20 I&N Dec. 257, 61 (BIA 1991) (drug trafficking). It would be one thing (though still quite odd) to say that Congress wished in this one area of the law to encourage travel abroad for noncitizens with criminal convictions; but the *Blake/Brieva* rule calls on the Court to believe that Congress had some deep purpose in wishing certain categories of aggravated felons to be benefited by travel abroad, whereas all other classes are disadvantaged by such travel. The sheer arbitrariness of the rule illustrates the slim likelihood that this rule reflects an understanding of the statute which Congress would endorse.

makes sense is to enforce *Francis'* mandate "to ensure that 'permanent residents who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.'" *Blake II*, 489 F.3d at 104 (*quoting Francis*, 532 F.2d at 273). What follows under this proper analysis is that both excludable and deportable noncitizens, regardless whether they left the country after conviction or remained here all along, are eligible for a § 212(c) waiver if the offense behind the grounds for removal could form a basis for exclusion under § 212. *See id.* That is the very analysis the BIA used for decades before adopting the new *Blake/Brieva* rule in 2005.

A. Noncitizens with the strongest ties to this country are often less likely to travel abroad.

A noncitizen's length of residence in this country often closely coincides with his ties to this country, such as his job, his U.S. citizen children, or his involvement in the community. A noncitizen with continuing employment, U.S. citizen children, family members who are U.S. citizens or other lawful permanent residents, and strong community ties, is less likely to travel abroad, especially to the noncitizen's original home country.

As explained above, Mr. Rubio, Mr. Birkett, Mr. Hoang, Mr. Frederick, and Mr. Bennett all are closely tied to the United States. All of these men have families, including children, living not in their home countries, but here. Mr. Hoang, Mr. Frederick, and Mr. Bennett have jobs in this country and long lists of professional or community recognition. Mr. Rubio served in the United States Naval Reserves. None of

these noncitizens has had any reason to travel abroad, particularly back to their home countries.

These stories show, not surprisingly, that noncitizens who have never traveled abroad and never returned to their home countries often have strong reasons to stay here. In short, their families, their jobs, their passions, their beneficiaries, their very lives are centered in the United States. Therefore, they stay here, and their ties to this country continue to grow.

B. Congress routinely passes laws granting more rights and favorable treatment to noncitizens with the most time in and connections to the United States.

Accordingly, for good reason, many laws granting rights to a noncitizen turn on whether the noncitizen has been or has remained in the United States for a requisite period of time. More generally, a noncitizen "has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). And although this Court has previously recognized travel as a basis to *deny* certain benefits to noncitizens, there is no precedent for—or reason to recognize—travel abroad as a way to *create or enhance* a noncitizen's rights in this country.

To the contrary, many laws granting noncitizens' rights include requirements that noncitizens remain in this country for a minimum amount of time. For example, under INA § 240A(a), 8 U.S.C. § 1229b(a), the Attorney General may cancel removal of a permanent resident not convicted of an aggravated felony if the immigrant has been a lawful permanent resident for not less than five years and has resided

in the United States continuously for seven years after having been admitted in any immigration status. Similarly, under INA § 240B(b), 8 U.S.C. § 1229b(b), the Attorney General may cancel removal for certain nonpermanent residents under certain circumstances, with one requirement being the noncitizen must have been physically present in the United States for a continuous period of not less than ten years.

Similarly, some statutes remove rights if a lawful permanent resident is away from the United States for too long. For example, if a lawful permanent resident is absent from the United States for less than 180 days, he can return without being considered as seeking a new admission into the United States. But if he is absent from the United States for a continuous period in excess of 180 days, then he must seek admission into the United States anew. *See* INA § 101(a)(13), 8 U.S.C. § 1101(a)(13).

Even § 212(c) itself included a similar requirement: the waiver was available only to lawful permanent residents who achieved seven years of consecutive domicile. Likewise, § 212(h), which provides a waiver for certain crimes that could be criminal grounds for exclusion, is also unavailable to a noncitizen who has previously been admitted to the United States as a lawful permanent resident if the noncitizen has not lawfully resided continuously in the United States for at least seven years immediately preceding the removal proceeding. *See* 8 U.S.C. § 1182(h).

Finally, the Court has previously recognized travel as a means of denying benefits to a noncitizen in this country, but not the other way around. In *INS v. Phinpathya*, 464 U.S. 183 (1984), the Court held that a statutory requirement of a noncitizen's seven-year

"continuous physical presence" as a condition for suspension of deportation was to be interpreted according to plain meaning, however severe the consequences. *Id.* at 196. In that case, the Court reversed the Ninth Circuit, holding that it improperly considered other factors beyond the provision's plain language. *Id.* at 187-88. The Court recognized that the case dealt "with a threshold requirement added to the statute specifically to limit the discretionary availability of the suspension remedy" and that it had "every reason to believe that Congress considered the harsh consequences of its actions." *Id.* at 193-94. In his concurrence, Justice Brennan recognized that certain types of travel—such as long, deliberate vacations to a noncitizen's home country—had "meaningful bearing[s] on the attachment or commitment an alien has to this country." *See id.* at 197 (recognizing a difference between a noncitizen's three-month vacation to her native country and a short vacation abroad or an inadvertent border crossing).

These laws and others show that Congress has consistently *rewarded* noncitizens for the length of time they remain in the United States, and generally for the amount of ties they have to this country, recognizing that a noncitizen who comes to this country and stays has stronger ties and is better assimilated than a noncitizen who comes and goes.

C. Limiting § 212(c) relief to noncitizens who travel abroad results in permanent exile for noncitizens who often have the greatest ties to the United States.

In enacting § 212(c), "Congress was concerned that there be some degree of flexibility to permit worthy

returning aliens to continue their relationships with family members in the United States despite a ground for exclusion." *Francis*, 532 F.2d at 272. But instead of considering relevant factors for § 212(c) waiver determinations, under *Blake/Brieva*, eligibility for § 212(c) often turns entirely on whether a noncitizen has left the country after conviction.

This makes no sense for noncitizens like Mr. Frederick who never left the country and thus are precluded from § 212(c) relief. If granted a chance to make his case for a § 212(c) waiver, Mr. Frederick would likely point to the successful completion of his education and participation in Alcoholics Anonymous while in prison, his active participation in his Catholic church, his success at his job, his home ownership, and his dedication to helping members of his community as told by the many people who have benefitted from his kindness. Brief for Petitioner at 11, *Frederick supra*. But none of this matters for the simple reason that he did not leave the United States and thus, under the *Blake/Brieva* rule, is categorically ineligible for § 212(c) relief.

The same is true for Mr. Birkett, who has raised his wife's two daughters since they were young children and now cares for his ailing wife who suffers from sickle cell anemia. Oral Decision of the Immigration Judge at 5, *Matter of Birkett*, A36-868-892 (Feb. 21, 2006). In fact, the immigration judge stated that if Mr. Birkett were eligible for § 212(c) relief, the judge would grant the application. But under the *Blake/Brieva* rule, Mr. Birkett is categorically denied the waiver. *Matter of Birkett*, A36-868-892, 2006 WL 2183538 (BIA June 20, 2006).

Compare the story of Reyes Manzueta, who was convicted of an aggravated felony when he returned

fire on a group of thieves he followed out of his store after they had robbed him. *Matter of Manzueta*, A93-022-672, 2003 WL 23269892 (BIA Dec. 1, 2003). Though Mr. Manzueta was also in deportation proceedings, rather than exclusion proceedings, the BIA applied the pre-*Blake/Brieva* rule and found that, because Mr. Manzueta's aggravated felony conviction for a crime of violence (the ground for his being deportable) also qualifies as a crime involving moral turpitude (an exclusion ground), Mr. Manzueta could apply for a § 212(c) waiver. *Id.* Mr. Manzueta pointed to his long residency, business ownership, close relationships with family, and the fact that he supported a terminally ill woman and received § 212(c) relief from deportation. *Id.* The BIA's decision contains no discussion of whether Mr. Manzueta traveled, because pre-*Blake/Brieva*, past travel had no bearing on whether a person was a good candidate for a § 212(c) waiver.

As the Second Circuit understood, and as in the case of Mr. Manzueta, the availability of the § 212(c) waiver should not turn on whether a noncitizen traveled abroad. *See Francis*, 532 F.2d at 273. Indeed, requiring a noncitizen to travel abroad and reenter does not make the noncitizen a "better resident of this country." *Matter of L-*, 1 I&N Dec. 1, 6 (BIA, A.G. 1940). Rather, "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time." *See Francis*, 532 F.2d at 273.

D. Exclusion proceedings provide no unique benefit to the Agency that explains the distinctive focus on foreign travel.

Nor can the Government set forth any alternative explanation as to why this new rule makes sense, in the face of the illogical and unintended result of treating noncitizens who remain in the United States more harshly than those who do not.

First, from an efficiency perspective, it is no easier to exclude a noncitizen than it is to deport him. When a lawful permanent resident leaves and attempts to reenter the country and is deemed excludable yet potentially eligible for a § 212(c) waiver, the noncitizen is generally allowed to enter and to apply for the waiver from within the country. *See Abebe*, 554 F.3d at 1216 (Thomas, J., dissenting). If the noncitizen is later denied the waiver, the Government must remove him. *See id.* The Government's involvement and expense are no different than if the noncitizen had applied for a § 212(c) waiver during a deportation proceeding. *See id.* Regardless of the type of removal proceeding, noncitizens are not summarily returned to their home countries. If they are found removable, the Agency still must go to the effort and expense to remove them.

Second, from an administrative perspective, the § 212(c) waiver process is the same regardless whether the noncitizen applies for the waiver in a deportation or exclusion proceeding. *See Matter of A-A-*, 20 I&N Dec. 492, 502 n.22 (BIA 1992) (*citing* Application for the Exercise of Discretion Under 212(c) of the Immigration and Nationality Act, 56 Fed. Reg. 50,033 (Oct. 3, 1991)). The Attorney General has made clear that § 212(c) relief is

available "whether at a port of entry or in subsequent proceedings before a district director or Immigration Judge." *Id.* at 502 (*quoting* 56 Fed. Reg. 50,033). In both cases, the noncitizen completes the same form, Form I-191, and in the same way, must identify the reasons the noncitizen may be inadmissible. Form I-191; 8 C.F.R. § 1212.3(a) and (e).

Third, there is simply no logical reason why Congress would have wished to particularly advantage travel abroad—when this country has a particularly poor track record in catching inadmissible noncitizens, *see Lovan v. Holder*, 574 F.3d 990, 992 (8th Cir. 2009) (individual allowed to return despite inadmissibility)—as opposed to other means by which noncitizens affirmatively bring themselves to the attention of the Government. Indeed, the other vehicles whereby noncitizens bring themselves to the Government's attention, such as applying for naturalization, renewing a lawful permanent resident green card, or otherwise filing other affirmative applications, would be more likely to result in the detection of the noncitizen's past criminal activity. For example, applying for naturalization requires a criminal background check, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, Title I, 111 Stat. 2440, 2448 (1997), and authorizes a more detailed investigation of the applicant. 8 U.S.C. § 1446(a). Given that the Agency's rule does not require the inadmissible noncitizen to affirmatively declare their inadmissibility, there is no reason why Congress would have thought that it would be particularly successful to encourage noncitizens with past criminal convictions to make brief trips abroad.

Finally, apart from issues regarding the threshold *eligibility* for § 212(c) relief, the actual grant of a § 212(c) waiver is and has always been discretionary. As a result, if a noncitizen's crime is serious or cause for concern, the Agency can simply deny the § 212(c) waiver request on the merits. *See Matter of Burbano*, 20 I&N Dec. 872, 878 (BIA 1994) ("Indeed, it has been long understood that as an alien's crimes become more serious, there will be less likelihood that he or she will be able to establish that a favorable exercise of discretion is warranted."). However, in cases that are less serious, like Mr. Rubio's burglary conviction when he was 17 years old following his involvement as the lookout during a burglary, Brief for Petitioner at Statement of Facts, *Rubio supra*, the Agency should consider the equities. Since Mr. Rubio's conviction, he served his time and then married, had children, and served in the United States military. *Id.* And in Mr. Birkett's case, in fact, the immigration judge stated that given the equities, if Mr. Birkett were eligible for a § 212(c) waiver, the judge would grant it. *Matter of Birkett*, A36-868-892, 2006 WL 2183538.

In other words, singling out noncitizens who have never left the country for harsher treatment makes no sense and runs contrary to established immigration policy. And no other explanation can resurrect this rule as logical and within Congress's intent.

CONCLUSION

For the foregoing reasons, *amici curiae* National Immigrant Justice Center and American Immigration Lawyers Association respectfully urge the Court to reverse the decision below.

Respectfully submitted,

CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
208 South LaSalle
Street
Suite 1818
Chicago, IL 60601
(312) 660-1370

MATTHEW L. GUADAGNO
AMERICAN IMMIGRATION
LAWYERS ASSOCIATION
1331 G Street, NW,
Suite 300
Washington, DC 20005
(202) 507-7600

BRIAN J. MURRAY
Counsel of Record
JONES DAY
77 West Wacker Drive
Suite 3500
Chicago, IL 60601-1692
(312) 782-3939
bjmurray@jonesday.com

ERIK J. CLARK
AMBER L. MERL
JONES DAY
325 John H. McConnell
Blvd., Suite 600
Columbus, OH 43215
(614) 469-3939

Counsel for Amici Curiae

JULY 12, 2011

AMICUS CURIAE BRIEF

AND
BRIEFS

JUL 12 2011

No. 10-694

IN THE
Supreme Court of the United States

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Brief Of *Amici Curiae* 39 Immigration Law Professors In Support Of Petitioner

MATTHEW D. MCGILL
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MMcGill@gibsondunn.com

Counsel for Amici Curiae

Library of Congress
Law Library

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

STATEMENT 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. BIA DETERMINATIONS OF ELIGIBILITY FOR SECTION 212(c) RELIEF ARE SUBJECT AT LEAST TO RATIONAL BASIS REVIEW. 6

A. The Equal Protection Guarantees Of The Constitution Apply To All Persons Physically Present In The United States, Including Aliens. 6

B. Discrimination Within A Class Of Aliens Must Survive At Least Rational Basis Review. 7

II. NO RATIONAL BASIS SUPPORTS THE BIA'S DISTINCTION AMONG DEPORTABLE ALIENS. 12

A. Classifications Drawn Must Be Rationally Related To An Identifiable State Interest. 12

B. The BIA's Classification Of Deportable Aliens Fails Even This Most Relaxed Mode Of Scrutiny. 14

CONCLUSION 20

APPENDIX A 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Abebe v. Mukasey,
554 F.3d 1203 (9th Cir. 2009) 15, 17

Ablang v. Reno,
52 F.3d 801 (9th Cir. 1995) 10

Azizi v. Thornburgh,
908 F.2d 1130 (2nd Cir. 1990) 10

Bangura v. Hansen,
434 F.3d 487 (6th Cir. 2006) 10

Blake v. Carbone,
489 F.3d 88 (2d Cir. 2007) 2

Breyer v. Meissner,
214 F.3d 416 (3d Cir. 2000) 10

Campos v. INS,
961 F.2d 309 (1st Cir. 1992) 9

City of Cleburne v. Cleburne Living Center, Inc.,
473 U.S. 432 (1985) 12, 13

Clark v. Martinez,
543 U.S. 371 (2005) 4, 19

Cockrill v. California,
268 U.S. 258 (1925) 7

De la Rosa v. U.S. Attorney General,
579 F.3d 1327 (11th Cir. 2009) 16

Delgadillo v. Carmichael,
332 U.S. 388 (1947) 11, 17, 18

DeSousa v. Reno,
190 F.3d 175 (3d Cir. 1999) 15, 16

Di Pasquale v. Karnuth,
158 F.2d 878 (2d Cir. 1947) 11, 18

FCC v. Beach Communications, Inc.,
508 U.S. 307 (1993).....12

Fiallo v. Bell,
430 U.S. 787 (1977).....4, 8, 9

Fong Haw Tan v. Phelan,
333 U.S. 6 (1948).....11

Francis v. INS,
532 F.2d 268 (2d Cir. 1976) 14, 16, 17

Friend v. Reno,
172 F.3d 638 (9th Cir. 1999).....10

Graham v. Richardson,
403 U.S. 365 (1971).....7

Heller v. Doe,
509 U.S. 312 (1993).....12, 14

Hines v. Davidowitz,
312 U.S. 52 (1941).....7

INS v. St. Cyr,
533 U.S. 289 (2001).....2

Johnson v. Robison,
415 U.S. 361 (1974).....13

Johnson v. Whitehead,
Nos. 09-1981, 10-1488, 2011 WL
1998333 (4th Cir. May 24, 2011).....10

Judulang v. Gonzales,
249 F. App'x 499 (9th Cir. 2007) 3

Jurado-Gutierrez v. Greene,
190 F.3d 1135 (10th Cir. 1999).....9, 15

Kleindienst v. Mandel,
408 U.S. 753 (1972) 4, 8

Kwong Hai Chew v. Colding,
344 U.S. 590 (1953) 7

LaGuerre v. Reno,
164 F.3d 1035 (7th Cir. 1998) 15, 16

Mathews v. Diaz,
426 U.S. 67 (1976) 7, 8, 17

Matter of Blake,
23 I. & N. Dec. 722 (BIA 2005) 2

Matter of Brieva-Perez,
23 I. & N. Dec. 766 (BIA 2005) 2

Matter of Judulang,
A34 461 941, 2006 WL 557842
(BIA Feb. 3, 2006) 3

Ng Fung Ho v. White,
259 U.S. 276 (1922) 11

Padilla v. Kentucky,
130 S. Ct. 1473 (2010) 11

Plyler v. Doe,
457 U.S. 202 (1982) 7

Reed v. Reed,
404 U.S. 71 (1971) 13

Reno v. Flores,
507 U.S. 292 (1993) 8

Requena-Rodriguez v. Pasquarell,
190 F.3d 299 (5th Cir. 1999) 2, 9, 15, 16

Romer v. Evans,
517 U.S. 620 (1996) 12, 13

Rosenberg v. Fleuti,
374 U.S. 449 (1963) 11, 17, 18

Takahashi v. Fish & Game Commission,
334 U.S. 410 (1948) 7

Truax v. Raich,
239 U.S. 33 (1915) 7

U.S. Department of Agriculture v. Moreno,
413 U.S. 528 (1973) 13, 14

United States v. Barajas-Guillen,
632 F.2d 749 (9th Cir. 1980) 10

Vance v. Bradley,
440 U.S. 93 (1979) 13

Vo v. Gonzales,
482 F.3d 363 (5th Cir. 2007) 15

Wong Wing v. United States,
163 U.S. 228 (1896) 7

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 4, 6, 7

Zadvydas v. Davis,
533 U.S. 678 (2001) 6, 19

Zamora-Mallari v. Mukasey,
514 F.3d 679 (7th Cir. 2008) 2

STATUTES

8 U.S.C. § 1101(a)(43)(F) 3

8 U.S.C. § 1182(a)(2)(A)(i)(I) 1

8 U.S.C. § 1182(c) 1

8 U.S.C. § 1227(a)(2)(A)(iii) 1

RULES

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

INTEREST OF *AMICI CURIAE*

Amici curiae are law school professors of immigration law. They research, write, and teach about the intersection of immigration law and the constitutional rights of noncitizens. *Amici curiae* have a professional interest in ensuring that this Court is fully and accurately informed about the law relating to the constitutional rights of lawful permanent resident aliens in the United States. *Amici* have no personal, financial, or other professional interest in, and take no position on, the other issues raised in the case at bar. *Amici* do not represent the views of their universities and join this brief solely on their own behalf. A complete list of *amici* is included as an Appendix.[1]

STATEMENT

An alien admitted to the United States is *deportable* under 8 U.S.C. § 1227(a)(2)(A)(iii) if he has been convicted of an aggravated felony at any point after his admission. Meanwhile, an alien may be inadmissible to the United States under 8 U.S.C. § 1182(a)(2)(A)(i)(I) if he has been convicted of "a crime involving moral turpitude."

Former Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), provides for a discretionary waiver of excludability for lawful permanent resident aliens reentering the United States, but this relief has long been applied also to aliens

---

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

who are deportable due to convictions that would likewise render them excludable. *See INS v. St. Cyr*, 533 U.S. 289, 295 (2001).[2] At issue in this case is the Board of Immigration Appeals' ("BIA") recent decision to foreclose deportable aliens from arguing that a deportable aggravated felony would also qualify as an excludable crime involving moral turpitude, but only if they have not left the United States since their convictions. According to the BIA, this result is compelled by the fact that the substantive deportability and excludability provisions do not utilize "similar language to describe substantially equivalent categories of offenses." *Matter of Blake*, 23 I. & N. Dec. 722, 728 (BIA 2005); *see also Matter of Brieva-Perez*, 23 I. & N. Dec. 766, 773 (BIA 2005).

Under this construction, a deportable alien who has remained in the United States may not seek relief, but a deportable alien who has traveled outside the country at some point since his conviction can argue that his offense qualifies as an excludable crime of moral turpitude that renders him eligible for Section 212(c) relief *nunc pro tunc*. *See Blake v. Carbone*, 489 F.3d 88, 94 (2d Cir. 2007) (noting that a "sleight of hand" allows the alien who has traveled abroad to be treated as though he is in exclusion proceedings instead of deportation proceedings); *see also Zamora-Mallari v. Mukasey*, 514 F.3d 679, 684 (7th Cir. 2008); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 308 (5th Cir. 1999).

---

[2] Though Congress repealed Section 212(c) in 1996, this Court held in *INS v. St. Cyr*, 533 U.S. 289 (2001), that Section 212(c) relief remains available to aliens who would have been eligible for such relief at the time of their plea agreements under the law then in effect. *Id.* at 326.

Petitioner Joel Judulang is a citizen of the Philippines who entered the United States in 1974 at the age of eight. Cert. Opp. 5. In 1989, he was convicted of voluntary manslaughter. *Id.* He has not traveled outside of the United States since this conviction. Pet. for Cert. 14. In 2005, the government commenced removal proceedings against Mr. Judulang. Cert. Opp. 5. An immigration judge found Mr. Judulang deportable based in part on his conviction for voluntary manslaughter, an aggravated felony "crime of violence" under 8 U.S.C. § 1101(a)(43)(F), and ordered him removed to the Philippines. Cert. Opp. 5-6. The immigration judge found that Mr. Judulang was not eligible for a waiver of deportation under Section 212(c). *Id.*

The BIA affirmed the deportation order, applying its decision in *Matter of Brieva-Perez* to hold Mr. Judulang ineligible for relief under Section 212(c) because, it stated, an aggravated felony "crime of violence" has no statutory counterpart in the grounds for excludability under Section 212(a). *Matter of Judulang*, A34 461 941, 2006 WL 557842 (BIA Feb. 3, 2006) (per curiam). If Mr. Judulang had left the country at any time after his conviction, however, he could have argued that he should be treated as excludable for having committed a "crime involving moral turpitude" and deemed eligible for Section 212(c) relief *nunc pro tunc* in deportation proceedings. Mr. Judulang sought review of the BIA's decision, and the Ninth Circuit denied his petition for review. *Judulang v. Gonzales*, 249 F. App'x 499 (9th Cir. 2007). The court held that his conviction for voluntary manslaughter was "not substantially similar to any ground for exclusion," precluding him from relief under Section 212(c). *Id.* at 502.

SUMMARY OF ARGUMENT

Though the question petitioner presents is one of statutory interpretation, background principles of constitutional law bear upon the statutory analysis. Where a statute is susceptible to more than one reasonable construction, the Court should presume "that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

The BIA's current interpretation of Section 212(c) violates the equal protection guarantees of the U.S. Constitution by classifying deportable lawful permanent resident aliens based on their travel history—a factor that bears no relation at all to any conceivable purpose Congress might have had in enacting Section 212(c)'s avenue for discretionary relief. The classification thus fails even rational basis scrutiny. This Court should not presume Congress intended such a result and should construe Section 212(c) in a manner that avoids the violation of equal protection principles that the BIA's and the Ninth Circuit's construction of Section 212(c) now imposes.

There is a long history of applying equal protection principles to noncitizens residing in the United States. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Though Congress retains significant power in the immigration context, this Court has not ceded enforcement of the Constitution's equal protection guarantees to the legislature. Instead, it has required that, at a minimum, legislative distinctions survive rational basis scrutiny.

In *Kleindienst v. Mandel*, 408 U.S. 753 (1972) and *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court held that, even in the context of *admission* into the United States, a congressional policy choice must demonstrate a "facially legitimate and bona fide reason" to survive judicial scrutiny. This

formulation restates rather than negates rational basis review. Courts applying *Fiallo* have consistently used *Fiallo*'s language interchangeably with more classic formulations of rational basis review. There has never been a suggestion from this Court that it intended to create a (conceptually troublesome) standard of review less deferential than rational basis scrutiny. If rational basis review applies to classifications drawn among applicants for admission into the United States, it follows that classifications drawn among lawful permanent residents should merit at least rational basis review, if not closer judicial scrutiny.

Rational basis review generously construes inferences in favor of the legislature, requiring only that a statutory classification be rationally related to a legitimate governmental interest—regardless of whether this interest was actually a purpose in the legislators' minds. It requires only that a court be capable of finding some practical advancement of an identifiable, legitimate purpose that is not wholly unrelated to the classification scheme utilized.

Even under the most relaxed conception of rational basis scrutiny, the BIA's interpretation of Section 212(c) violates equal protection. The government has not offered any rational basis for the classification BIA has drawn among deportable aliens because there is simply no legitimate state purpose discernible from discriminating among deportable legal resident aliens based on their travel histories. To the extent a relationship between travel and eligibility for continued residence in the United States is ascertainable, Congress could rationally *favor* those resident aliens who remain in the country and who presumably exhibit greater loyalty to, or desire to remain in, the United States. The BIA's interpretation of Section 212(c) does exactly the opposite and *penalizes* the group that, by its continuous physical

presence, has demonstrated a more steadfast attachment to the United States. The irrationality of this scheme is confirmed by the fact that it could operate successfully only if deportable noncitizens were aware of the immigration consequences of their travel histories. Yet, few (if any) noncitizens possibly could have predicted the BIA's abrupt change in course with respect to its interpretation of Section 212(c).

Because the BIA's interpretation of Section 212(c) to distinguish among deportable noncitizens based on their travel history raises serious constitutional issues, this Court should avoid it.

ARGUMENT

I. BIA DETERMINATIONS OF ELIGIBILITY FOR SECTION 212(C) RELIEF ARE SUBJECT AT LEAST TO RATIONAL BASIS REVIEW.

A. The Equal Protection Guarantees Of The Constitution Apply To All Persons Physically Present In The United States, Including Aliens.

Though it has been said that "Congress has 'plenary power' to create immigration law," "that power is subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). One of those "important constitutional limitations" is the guarantee of equal protection of the laws provided by the Fifth and Fourteenth Amendments.

At least since *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), it has been clear that the Fourteenth Amendment applies to all "persons" within the jurisdiction of the United States, regardless of their alienage. *Id.* at 369. The Due Process Clause and Equal Protection Clause, the Court held, "are universal in their application, to all persons within the

territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." *Id.* And at least since *Wong Wing v. United States*, 163 U.S. 228 (1896), it has been clear that the Fifth Amendment similarly guarantees that a legal resident alien "is entitled to the equal protection of [the] laws." *Id.* at 242 (Fields, J., concurring in part and dissenting in part).

In the century that followed, this Court repeatedly affirmed that the Constitution's guarantees of equal protection extend to aliens physically present in the United States. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948); *Hines v. Davidowitz*, 312 U.S. 52, 69 (1941); *Truax v. Raich*, 239 U.S. 33, 39 (1915). Those guarantees apply even to aliens present without authorization. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *see also Plyler v. Doe*, 457 U.S. 202, 210 (1982). "[U]ntil [a person present in the United States] leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States—he is entitled to the equal protection of the laws." *Plyler*, 457 U.S. at 215.

B. Discrimination Within A Class Of Aliens Must Survive At Least Rational Basis Review.

Though Congress has "wide discretion" in the immigration and naturalization contexts, the Equal Protection Clause requires at least that it "classify persons on bases that are reasonable and germane having regard to the purpose of the legislation." *Cockrill v. California*, 268 U.S. 258, 262 (1925). In

Mathews, for example, the Court stressed the appropriateness of "a narrow standard of review" but still proceeded to scrutinize Congress's limits on eligibility for a federal medical insurance program. 426 U.S. at 82. The Court concluded that an eligibility classification drawn based on "both the character and the duration of his residence" survived rational basis review because "those who qualify under the test . . . may reasonably be presumed to have a greater affinity with the United States than those who do not," and it was reasonable for Congress to parcel out such benefits based on the strength of an alien's ties to the United States. *Id.*; *see also Reno v. Flores*, 507 U.S. 292, 306 (1993) (describing the broad power of Congress in the immigration context but observing that, "[o]f course," a regulation must still survive rational basis scrutiny).

This Court's decision in *Fiallo v. Bell*, 430 U.S. 787 (1977) is not to the contrary. *Fiallo* considered a provision in the Immigration and Nationality Act that granted preferential immigration status to a parent-child relationship involving an unwed mother but not to an identical relationship involving an unwed father. *Id.* at 788-89. In holding that the statute did not violate equal protection, the Court noted that, even in the context of regulation of entry into the United States, Congress needed at least a "'facially legitimate and bona fide reason'" to make such a policy choice. *Id.* at 794 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)).

Despite its deferential language, the *Fiallo* Court hardly treated this standard as negating the equal protection inquiry. Indeed, the Court explicitly rebuffed the government's argument that equal protection claims brought by those seeking entry into the United States were nonjusticiable; the Court saw no

basis for it to abdicate "judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens." *Fiallo*, 430 U.S. at 793 n.5. Instead, the Court pointed to at least two possible rational bases for the legislative distinction: "a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations." *Id.* at 799.

Some courts of appeals have suggested that *Fiallo* created a stand-alone constitutional standard unique to the immigration realm. *See, e.g., Campos v. INS*, 961 F.2d 309, 316 (1st Cir. 1992) ("The test for determining the constitutionality of an immigration law provision is whether it is based upon a 'facially legitimate and *bona fide* reason.'" (quoting *Fiallo*, 430 U.S. at 794)); *see also Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 309 (5th Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1152 (10th Cir. 1999). In fact, *Fiallo* applied the same brand of rational review (albeit with verbal variances) as this Court has applied repeatedly since. Indeed, the government recognizes as much. In its opposition to certiorari, it uses the *Fiallo* standard and the rational basis standard interchangeably, first quoting the "facially legitimate and bona fide reason" language, Cert. Opp. 11, then describing its analysis as occurring "under the rational-basis standard of review," *id.* at 13.

While the *Fiallo* standard and the rational basis standard have in practice been treated identically by this Court, lower courts have more explicitly considered the two terms synonymous. The Ninth Circuit has expressly adopted the approach that *Fiallo* left implicit in its analysis: "Although the Supreme Court has never explicitly described the standard for re-

viewing immigration-law classifications among aliens as a rational basis test, . . . the rational-basis standard of review . . . is consistent with the Supreme Court's approach as reflected in the [*Fiallo*] language." *United States v. Barajas-Guillen*, 632 F.2d 749, 752 (9th Cir. 1980); *see also Friend v. Reno*, 172 F.3d 638, 645-46 (9th Cir. 1999) (stating that the *Fiallo* "inquiry is equivalent to the more traditional rational basis review used in many equal protection cases"); *Ablang v. Reno*, 52 F.3d 801, 804 (9th Cir. 1995) (reaffirming that "the 'facially legitimate and bona fide reason' test is equivalent to the rational basis test typically applied in equal protection cases").

The Second Circuit also has equated the search for a "facially legitimate and bona fide reason" with rational basis scrutiny. When the government sought a lower level of scrutiny in the immigration context, the court responded "that no distinction is intended by the ['facially legitimate and bona fide reason'] language and therefore conclude[d] that the rational basis test is applicable." *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 n.2 (2nd Cir. 1990).

Other circuits are in accord. *See, e.g.*, *Johnson v. Whitehead*, Nos. 09-1981, 10-1488, 2011 WL 1998333, at *6 (4th Cir. May 24, 2011) (equating faithfulness to *Fiallo*'s "facially legitimate and bona fide reason" language with the "appl[ication of] rational basis review"); *Breyer v. Meissner*, 214 F.3d 416, 422 n.6 (3d Cir. 2000) (observing that the *Fiallo* test "has been found analytically equivalent to the rational basis test normally applied in equal protection cases in which no suspect class is involved"). *But see Bangura v. Hansen*, 434 F.3d 487, 495 (6th Cir. 2006) (leaving open the possibility

that the *Fiallo* standard "may be even lower than rational basis review").

If rational basis review applies to congressional policy choices concerning the *entry of aliens*, the harshness of *deportation for lawful permanent residents*, which this Court has explained "can be the equivalent of banishment or exile," commands application of at least that minimal level of scrutiny in this context. Indeed, precisely "because deportation is a drastic measure," this Court previously has resolved doubts in construing immigration statutes to avoid deportation. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) Like procedural due process guarantees of fair notice and an opportunity to be heard, fair application of rational basis review similarly ensures at least that the government does not "make [a resident alien's] right to remain here dependent on circumstances . . . fortuitous and capricious." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *see also Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (underscoring the "severity" of deportation as a punishment); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (opining that deportation can result not only in loss of liberty but also "in loss of both property and life; or of all that makes life worth living").

As Judge Learned Hand wrote in *Di Pasquale v. Karnuth*, 158 F.2d 878 (2d Cir. 1947), later to be quoted in full by the Supreme Court, *Rosenberg v. Fleuti*, 374 U.S. 449, 455 (1963): "It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, *shall not be subject to meaningless and irrational hazards*." 158 F.2d at 879 (emphasis added). Protection against "irrational hazards" is all that rational basis

review affords, and *Fiallo* does not license the government to impose such irrationalities, peculiarly, in the immigration context alone.

II. No Rational Basis Supports The BIA's Distinction Among Deportable Aliens.

A. Classifications Drawn Must Be Rationally Related To An Identifiable State Interest.

Properly conceptualized, the rational basis standard of review in equal protection cases balances competing, and often contradictory, objectives: maintaining due deference for legislative judgments and preventing arbitrary burdens on disadvantaged groups. This level of scrutiny "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Requiring a meaningful—albeit deferential—relationship between the government interest and the means adopted, however, "gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature . . . ; and it marks the limits of [the judiciary's] own authority." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

Rational basis review requires that any law that differentiates among similarly situated people at a minimum reflect: (1) an identifiable, legitimate state interest the legislature could have pursued, and (2) a rational attempt to advance such interest through the disparate treatment. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) ("Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473

U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973) ("Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest.").

While the legitimate governmental purpose that forms the first prong of the rational basis inquiry need not be *identified* by the legislature, it must at least be *identifiable* by the court; it must be a purpose that "could . . . reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). Deference to legislative decisions is appropriate only when the facts supporting the identified purpose are at least "arguable." *Id.* at 112; *see also Romer*, 517 U.S. at 632 (noting that laws subject to rational basis scrutiny must be "grounded in a sufficient factual context" to allow for meaningful judicial review).

The challenged classification must also bear a rational relationship to the achievement of the ascertainable interest. In the first instance, this requirement means that division into legal categories must be grounded on criteria related to the statute's aims. *Cleburne*, 473 U.S. at 446 (noting that a classification's "relationship to an asserted goal [may not be] so attenuated as to render the distinction arbitrary or irrational"); *Johnson v. Robison*, 415 U.S. 361, 374 (1974) (observing that equal protection denies the power to create "'different classes on the basis of criteria wholly unrelated to the objective of that statute'" (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971))). A rational relationship does not require "precise

mathematical nicety" but does require that disparate treatment not be "wholly without any rational basis." *Moreno*, 413 U.S. at 538 (internal quotation marks omitted). Such relationship, moreover, may not be merely theoretical; instead, a challenged classification must operate rationally "in practical effect." *Id.* at 537. A court must ultimately be capable of "find[ing] some footing in the realities of the subject addressed by the legislation" for the legislature's choice to provide for disparate treatment of otherwise comparable groups. *Heller*, 509 U.S. at 321.

B. The BIA's Classification Of Deportable Aliens Fails Even This Most Relaxed Mode Of Scrutiny.

The BIA's new interpretation of Section 212(c) draws a distinction between two groups of *deportable* residents: those who have left the United States subsequent to their convictions and returned, and those who have remained in the United States. *See* Cert. Reply Br. 8-9; *see also* Cert. Opp. 17 (observing that the "[p]etitioner could have easily avoided [the effects of the BIA's interpretation] by departing the country voluntarily at any point before his removal proceedings were initiated").

The government has suggested no rational basis for this distinction—and has not done so in thirty-five years. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) (noting a similar failure on the government's part "to suggest any reason why this petitioner's failure to travel abroad following his conviction should be a crucial factor in determining whether he may be permitted to remain in this country").

Various courts of appeals have suggested various (quite thin) rationales for distinguishing between aliens in exclusion proceedings and aliens in deporta-

tion proceedings. A number of courts have suggested that Congress may rationally treat excludable aliens more leniently than deportable aliens to create an incentive for deportable aliens to leave the country on their own: "To induce their voluntary departure, a little carrot is dangled before them, consisting of the opportunity to seek a waiver should they seek to return to the country . . . ." *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998); *see also Abebe v. Mukasey*, 554 F.3d 1203, 1206 (9th Cir. 2009) (en banc) (per curiam); *Vo v. Gonzales*, 482 F.3d 363, 371 (5th Cir. 2007); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 309 (5th Cir. 1999). Relatedly, other courts have surmised that voluntary departures from the United States could lead to procedural cost savings because not all departing aliens would attempt to return, thus reducing the aggregate number of deportation and exclusion proceedings. *See, e.g.*, *DeSousa v. Reno*, 190 F.3d 175, 185 (3d Cir. 1999). And, less obviously, some have divined a relation to public safety, noting that deportable criminal aliens remain a danger to the American public, while criminal aliens outside the United States pose no such threat. *See Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1152-53 (10th Cir. 1999).

But even if these asserted justifications could survive a fair application of rational basis review—and they cannot—each of them is, at most, a rationale for distinguishing between *excludable* and *deportable* aliens. These rationales have no application whatsoever to distinctions *among deportable aliens*. Each focuses on the presumed advantages of a waiver process that occurs while the alien applicant is physically located *outside the United States*. But as between two groups of deportable aliens, *both physically present inside the United States* at the

time of their deportation proceedings, the conceivable rational bases hypothesized by lower courts are utterly irrelevant.

In fact, even those courts of appeals that have upheld classifications on the basis of differences between *excludable* and *deportable* aliens have reiterated the irrationality of discriminating between two classes of *deportable* aliens. *See, e.g.*, *De la Rosa v. U.S. Attorney General*, 579 F.3d 1327, 1338 (11th Cir. 2009) (per curiam) (stressing its commitment to *Francis*'s extension of "equal protection to two classes of similarly situated deportable aliens"); *DeSousa*, 190 F.3d at 183-84 (reaffirming that "the distinctions drawn by the BIA [before *Francis*] among certain deportable aliens were irrational"); *Requena-Rodriguez*, 190 F.3d at 309 (opining that a distinction between excludable and deportable aliens "is not so tenuous as the one rejected in *Francis*"); *LaGuerre*, 164 F.3d at 1041 (noting that in *Francis* "the government was taking the irrational position" that international travel entitled a deportable alien to more consideration in deportation proceedings).

The BIA's current interpretation of Section 212(c) commits exactly the equal protection violation that *Francis* avoided—"creat[ing] two classes of aliens identical in every respect except for the fact that members of one class have departed and returned to this country at some point after they became deportable." 532 F.2d at 272. Equal protection guarantees—and common sense—prohibit classes of permanent lawful resident aliens from being treated differently in their eligibility for discretionary relief on the basis of "irrelevant and fortuitous factors" like travel history. *Id.* at 273. After all, such an arbitrary dividing line may permit discretionary relief for someone who enters Canada for a few hours but not for a

similarly situated resident alien who remains in the United States. *Id.*; *see also Abebe*, 554 F.3d at 1219 (Thomas, J., dissenting) ("There is no rational basis for treating a lawful permanent resident who steps across the border for a day better than one who does not.").

It is possible that travel history might bear some rational relationship to legislative objectives in the immigration context; any relationship, however, would be exactly the inverse of that suggested by the BIA's current interpretation of Section 212(c). Indeed, if any rational distinction can be made based upon travel history, it is that Congress may be within its power to *disfavor* those aliens who have traveled abroad with a given frequency. *See Rosenberg v. Fleuti*, 374 U.S. 449, 461 (1963) (noting that "valid policy reasons" exist for legislating that a legal permanent resident "imperils his status by interrupting his residence too frequently or for an overly long period of time"); *see also Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (permitting Congress to draw lines that favor those aliens who have been in the country longest). The reverse proposition—favoring aliens who remain in the country less often—serves no conceivable legislative aim. *See Francis*, 532 F.2d 273 ("Reason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive *at least as much* consideration as an individual who may leave and return from time to time.") (emphasis added).

It should not be surprising, then, that this Court already has recognized that brief, temporary travel is an irrational basis upon which to ground momentous immigration consequences. In *Delgadillo v. Carmichael*, 332 U.S. 388 (1947), a Mexican citizen

legally residing in the United States traveled on an American merchant ship that was torpedoed near Cuba. *Id.* at 389. He was rescued, taken to Cuba for about one week, and returned to the United States, where he was later placed in deportation proceedings. *Id.* at 389-90. The Court held that classifying his return to the country as an "entry" for purposes of the Immigration and Nationality Act would be "a capricious application" of the law, *id.* at 391, and would "impute to Congress a purpose to subject aliens 'to the sport of chance,'" *id.* (quoting *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947)).

The Court solidified this posture in *Rosenberg v. Fleuti*. In that case, a permanent resident with Swiss citizenship voluntarily left the United States to visit Mexico for a few hours. 374 U.S. at 450. He was later placed in deportation proceedings in part because of his "entry" into the United States after this brief excursion. *Id.* The Court again held that when a lawful resident alien "steps across a border and, in effect, steps right back, subjecting him to exclusion . . . seems to be placing him at the mercy of the 'sport of chance' and the 'meaningless and irrational hazards' to which Judge Hand alluded." *Id.* at 460 (quoting *Di Pasquale*, 158 F.2d at 879). Ultimately, the *Rosenberg* Court construed the relevant statute to draw no such arbitrary lines based on brief travel outside the country, recognizing that "the insignificance of a brief trip to Mexico or Canada bears little rational relation to the punitive consequence of subsequent excludability." *Id.* at 461.

As in *Delgadillo* and *Rosenberg*, the irrationality of the distinction drawn here by the BIA is amplified by the abruptness with which it was sprung on noncitizens. Few, if any, noncitizens—indeed, few, if

any, professors of immigration law—could have predicted that the BIA would invent a "similar language" test completely untethered to the text or historical application of Section 212(c) in order to limit eligibility for discretionary relief. Whatever governmental objective (if any) is advanced by encouraging deportable noncitizens to take ephemeral trips abroad depends completely on those noncitizens being aware of the benefit to be obtained from such trips. The absence of fair notice of the significant immigration consequences arising from such a trip (or the failure to take it)—manifest here but threatened whenever the government abruptly announces a novel and textually insupportable interpretation of an immigration statute—obliterates any chance that the government will obtain its hypothesized benefit. This confirms that the BIA's interpretation advances no conceivable legitimate governmental interest.

This Court has recognized that when the government's interpretation of an immigration law "would raise a serious constitutional problem," it is appropriate to construe the statute instead "in light of the Constitution's demands" if the language of the statute possibly admits of such a construction. *Zadvydas v. Davis*, 533 U.S. 678, 689-90 (2001); *see also Clark v. Martinez*, 543 U.S. 371, 381 (2005). The BIA's distinction among deportable noncitizens, favoring those who travel outside the United States over those who remain within the United States, does, indeed, "raise a serious constitutional problem," because it does not—and cannot, given the manner in which it was issued—rationally advance any legitimate governmental objective. This Court should avoid that interpretation.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to interpret Section 212(c) in a manner that avoids constitutional infirmities by requiring similar treatment of similarly situated deportable aliens. If it does so, the judgment of the court of appeals must be reversed.

Respectfully submitted,

MATTHEW D. MCGILL
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MMcGill@gibsondunn.com

Counsel for Amici Curiae

July 12, 2011

APPENDIX

APPENDIX – LIST OF SIGNATORIES*

Professor Raquel Aldana
McGeorge School of Law
University of the Pacific

Professor Stacy Caplow
Brooklyn Law School

Professor Gabriel J. Chin
School of Law
University of California, Davis

Professor Michael J. Churgin
University of Texas School of Law

Professor Alice Clapman
University of Baltimore School of Law

Professor Fernando Colon-Navarro
Thurgood Marshall School of Law
Texas Southern University

Professor Lauren Gilbert
St. Thomas University School of Law

Professor Pratheepan Gulasekaram
Santa Clara University School of Law

Professor Susan Gzesh
University of Chicago Law School

---

* Individual *amici* appear on this brief in their own behalf. Institutions are listed for identification purposes only.

Professor Dina Francesca Haynes
New England Law | Boston

Professor Maurice Hew, Jr.
Thurgood Marshall School of Law
Texas Southern University

Professor Geoffrey A. Hoffman
University of Houston Law Center

Professor Anil Kalhan
Earle Mack School of Law
Drexel University

Professor Harvey Kaplan
Northeastern University School of Law

Professor Peter Margulies
Roger Williams University School of Law

Professor Fatma E. Marouf
William S. Boyd School of Law
University of Nevada Las Vegas

Professor Elizabeth McCormick
University of Tulsa College of Law

Professor M. Isabel Medina
Loyola University New Orleans College of Law

Professor Nancy Morawetz
New York University School of Law

Professor Hiroshi Motomura
School of Law
University of California, Los Angeles

Professor Michael A. Olivas
University of Houston Law Center

Professor Nina Rabin
James E. Rogers College of Law
University of Arizona

Professor Renee C. Redman
University of Connecticut School of Law
Quinnipiac University School of Law

Professor Maritza Reyes
Florida A&M University College of Law

Professor Victor C. Romero
Dickinson School of Law
Pennsylvania State University

Professor Joseph H. Rosen
Atlanta's John Marshall Law School

Professor Rachel E. Rosenbloom
Northeastern University School of Law

Professor Irene Scharf
University of Massachusetts School of Law,
Dartmouth

Professor Ragini Shah
Suffolk University Law School

Professor Andrew Silverman
James E. Rogers College of Law
University of Arizona

Professor Peter J. Spiro
Beasley School of Law
Temple University

Professor Juliet Stumpf
Lewis & Clark Law School

Professor David B. Thronson
Michigan State University College of Law

Professor Enid Trucios-Haynes
Louis D. Brandeis School of Law
University of Louisville

Professor Diane Uchimiya
University of La Verne College of Law

Professor Michael S. Vastine
St. Thomas University School of Law

Professor Jonathan Weinberg
Wayne State University Law School

Professor Michael J. Wishnie
Yale Law School

Professor Stephen Yale-Loehr
Cornell University Law School